

**The London School of Economics and  
Political Science**

***An Economic History of Hundi,  
1858-1978***

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## **Declaration**

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## **Abstract**

A centuries-old artery of credit for Indian merchant networks, the indigenous credit system hundi has received no systematic attention in histories of the Indian subcontinent. Poorly understood and ill-defined, hundi was a highly negotiable instrument, and source of liquid capital. Hundi knitted together the properties of goods, capital, credit, information and agency, all of which served as the backbone of the Indian merchant network.

Drawing on government proceedings, reports, and legal cases, this study provides an insight into the legal encounter between Indian indigenous institutions and the British colonial government. It simultaneously reveals the customs, contracts and individual functions of hundi determining its usage. In particular, this study addresses the important issue of how legal change in colonies affected the so-called 'informal' institutions which made trade possible.

Between 1858-1947, hundi caught the eye of the British Indian government initially as an important taxable revenue stream. This resulted in hundi being integrated with statutes and regulations during the colonial period. However, this process of formalization was not without its own share of classificatory and interpretive problems, nor did hundi remain unchanged.

Material from the 1930s reveals an appreciable change in how the government perceived hundi. The instrument distinguishes itself as a source of liquidity capable of promoting trade and modern banking developments. Moreover, hundi's importance to the indigenous banking community underscores hundi's function within the wider Indian economy. Nevertheless, the system's integration with modern banking continued to present problems. The penultimate chapter explores why problems persisted, examining how a legal solution was proposed in 1978. Finally, the conclusion ties all the threads together and discusses the implications for hundi's survival.

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## Chapter 1 Introduction

### 1.1 A Very Brief Definition

A comprehensive history of the South Asian indigenous credit institution known as *hundi* does not exist. The scholarly literature is littered with numerous references to hundi as a tool of trade for India, but these are scattered, with no systematic in-depth treatment. Using labels applied to British credit instruments, a hundi is broadly described as a bill of exchange and a method of remittance, i.e. used both to settle debts and to transfer funds. In other words, hundi was both an instrument and system of credit. This is an approximate definition to gain some sense of how hundi functioned, but as we shall see in subsequent chapters, hundi could function in multiple ways, depending on the indigenous customary usage which governed it, at any given time. For instance, hundi drawn by a *sarraf* or *shroff* (money changer or banker) to expedite remittances, might very well be considered a deposit accepted by the sarraf. In like fashion, the sarraf was actually lending money when he discounted a hundi.<sup>1</sup>

### 1.2 Aim and Analytical Significance

In this thesis, I chart the colonial and post-Independence history of hundi, as a means of understanding patterns of Indian business relations, the wider political, legislative and economic dynamics of colonial state formation, and the legacies of legislation.

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<sup>1</sup> Irfan M. Habib, "Banking in Mughal India," in *Contributions to Indian Economic History I*, ed. Tapan Raychaudhuri (Calcutta: Firma K.L. Mukhopadhyay, 1960). P. 17.

Since hundi is a living institution, this study also contributes to ongoing policy discussions of the 21<sup>st</sup> century. Questions about legitimacy and which rule of law should apply to hundi, still continue to dog the system, as will be elaborated in the section on 'Scope'. Yet modern technology has also changed the face of hundi, making custom and functional remit a more global phenomenon. Thus, in many ways, hundi, and other like indigenous systems, have moved from being an indigenous matter, to one which faces the modern banking environment across the globe. It is hoped that this historical study will serve contemporary observers and policy makers, in shedding some light on the ways in which such systems are affected by legislation. For 21<sup>st</sup> century policy makers, an understanding of hundi's past must surely aid dialogue between hundi agents and law enforcement agencies.

### **1.3 Scope: Why 1858-1978?**

This period is defining in several respects: the first 89 years from 1858-1947, represent the life-span of the British Raj, and thus a critical juncture in the status of indigenous institutions such as hundi. 1947-1978 delineates a time when the legacy of the colonial architecture motivates further inquiry into the operational and legal status of indigenous instruments. I chose to stop my analysis at 1978 because the last official report on hundi would appear to be that of the Government of India's Banking Laws Committee in 1978, although, since the matter was never resolved it is not clear why no further reports on hundi were issued beyond this date. From the late 1980s the status of hundi appears to change dramatically, with fresh laws encumbering hundi with illegal status. Why and how hundi achieved this infamy post-1978, are questions deserving greater scrutiny, and could in themselves constitute a separate dissertation. Instead I have chosen in the final chapter to look at how hundi's uneasy modern-day status has

catapulted the system into law enforcement and development policy discourses.

The choice of the time-frame as a whole facilitates engagement with scholarship on modifications to the institutional foundations of Indian trade during the colonial period. *Hundi* embodies an institution that was traditionally enforced through customary rules, but which simultaneously becomes subject to legal contractual enforcement. This raises questions about institutional path development and the conditions necessary for the development of trade and a market economy

#### 1.4 Stereotypes and Legal Hurdles in the post-1978 Literature

The post-1978 literature treats *hundi* very differently, as a largely prohibited entity. Ironically, this ancient South Asian banking system which had earned a reputation for 'trust', has in the last two decades been widely regarded as an opprobrious marker of the black market economy. Also known as *hawala*, *havala*, or *havale*, *hundi*'s disrepute is reflected in the many villainous descriptions awash in the international press: 'illegal financial transactions market',<sup>2</sup> 'black money' and 'drug money',<sup>3</sup> 'system of tax evasion',<sup>4</sup> 'illegal transfers of foreign exchange',<sup>5</sup> 'illegal money laundering network',<sup>6</sup> and Hindi word meaning 'providing a code'.<sup>7</sup> In a similar vein,

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<sup>2</sup> M. Rama Rao, *Finance Minister Interviewed on Inflation, IMF, Subsidies*, 1545 GMT, 22 June (1993); *ibid*.

<sup>3</sup> Erhard Haubold, "Spekulationen ueber die Rolle der indischen Mafia (Speculation over the role of the of Indian Mafia)," *Frankfurter Allgemeine Zeitung GmbH* 1993.

<sup>4</sup> Philip Coggan, "The Chronology of corruption," *The Financial Times* 1991, Accessed: LexisNexis April 2004.

<sup>5</sup> Shirish Nadkarni, "Confidence in tatters over hawala fallout," *South China Morning Post* 1996. Accessed: LexisNexis June, 2004.

<sup>6</sup> Chhaya Mayank, "Diaries Tell A Sordid Story of Corruption," *India Abroad* 1996. Accessed: Lexis Nexis, June 2004.

the descriptions of hawala and hundi as *informal* or *alternative*<sup>8</sup> have developed because they are perceived as both unofficial and lacking in legal accountability. The confusion does not cease there; there is no universal agreement over whether hundi and hawala are in fact the same, and, just as press descriptions have been wildly different, this uncertainty has much to do with divergent opinions of what hundi and hawala respectively are.

Whether hundi has achieved this disrepute post-1978 because further laws changed the legal status of hundi, is a subject worthy of scrutiny in future work, but is not covered in this thesis. We can also speculate that in many ways, the notoriety collected by hundi and hawala is connected to what Austin and Sugihara correctly describe as the broader “disparaging” connotations of the words informal or “unorganised”.<sup>9</sup> The authors argue such negative connotations arise from the persisting dominant view that indigenous or traditional banking and its instruments were primitive and inefficient. The events of September 11, 2001, have particularly focused attention on hundi/hawala’s perceived vulnerability to money laundering and militant financing. On the other hand, in the last decade, the system’s role as a cost-effective, reliable and more accessible conduit for migrant worker remittances has been fairly well documented. This has attracted substantial attention from academics and policymakers keen to develop a better understanding of the role of remittances in poverty reduction.<sup>10</sup>

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<sup>7</sup> "India Cash Market Tied to Burgeoning Scandal; Funds from Abroad Key Hawala Deals," *Chicago Tribune* sourced from the *Associated Press* 1996. Accessed: LexisNexis June 2004.

<sup>8</sup> Widely used by Interpol, the Financial Action Task Force (FATF) and the Asia-Pacific Economic Cooperation (APEC) for instance.

<sup>9</sup> Gareth Austin and Kaoru Sugihara, *Local Suppliers of Credit in the Third World, 1750-1960* (London: Macmillan Press Ltd, 1993). P.2

<sup>10</sup> See Mohammed El Qorchi, Samuel M. Maimbo, and John F. Wilson, *Informal Funds Transfer Systems: An Analysis of the Informal Hawala System* (Washington D.C.2003). And

A critical problem in all of this has been definition. At the Third International Conference on Hawala in Abu Dhabi, in April 2005 (jointly hosted by the Central Bank of the UAE, the International Monetary Fund (IMF) and the World Bank), opinions of what hundi was, and related policy prescriptions were so divergent that I realized the question of definition was a matter of urgency. This divergence is reflected in the post-1978 official literature by international law enforcement and development agencies, and also accounts for disparate policies and laws.

Another key flaw in the post-1978 literature is that it dates back to the 1990s at the earliest. Even the scurrilous press reports only appear to commence from 1988.<sup>11</sup> It is worth noting that the first most comprehensive attempt at cutting through many of the myths surrounding hundi/hawala, was only published in 1999.<sup>12</sup>

A further aspect that demanded clarification, as we shall see in chapter two, was whether hundi and hawala could indeed be regarded as the same. The discussion in chapter two will reveal my approach of treating the two as the same. Again, opinions on this matter varied across the modern literature. In some quarters, the term hundi was regarded as an ancient credit instrument that was now obsolete. At a conference on migrant worker remittances hosted by the World Bank and the UK's Department for International Development (DFID) in 2006, I remember conversing with a delegate from

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IMF, ed. *Regulatory Frameworks for Hawala and Other Remittance Systems* (Washington D.C.: IMF Publication Services, 2005).

<sup>11</sup> According to a search of English language news on Nexis.

<sup>12</sup> Nikos Passas, *Informal Value Transfer Systems and Criminal Organisations: A Study into So-Called Underground Banking Networks* (Netherlands Ministry of Justice, 1999).

the Reserve Bank of India (RBI) who emphatically declared that hundi and hawala are very different entities. Hundi, the RBI member explained, was a bill of exchange, whereas hawala was a remittance system that has also been associated with a number of criminal activities. This viewpoint was not surprising given that hawala is wholly illegal in India, and has, in the last two decades, become a notorious byword for illicit activity.

In general, outside the archives, conducting research on hundi was always challenging. Since the system is prohibited in India, the word hundi has become so loaded, that introducing it as a topic of research did involve some navigation. I frequently found that I needed to reiterate my role as a scholar, and my position of detachment from other agencies' agendas, was essential to earning trust. Questions about hundi were met with responses ranging from blankness, suspicion, and curiosity. I found that fact and myth were bound together, and one of my challenges was to attempt a separation of the two. Once gained, infamy is very hard to shake off, and myth often resembles fact if repeated often enough.

This uneasy modern-day status of hundi provided part of the impetus for looking at its past. Alongside this, I discovered that legislative dialogue on the status of hundi was fairly extensive from 1858-1978, and yet had not been referenced in post-1978 literature. In the official literature from 1858 to 1978, hundi is described as *indigenous*, and distinguished from British credit instruments. However, as a key credit instrument hundi was both an important tool of trade for Indian merchants, and a revenue source for the British Indian government. The system went through a process of



formalization, which renders the post-1978 hundi descriptions – ‘informal’, ‘unorganized’, or ‘illicit’ – inapplicable for the period 1858 to 1978.<sup>13</sup>

In conjunction with the application of these laws, the question of defining hundi was given more systematic attention at particular points during the colonial period. The driving force behind such enquiry was the implementation of new Acts, regulations, or, as in the case of the Provincial Banking Enquiry Committee Reports (PBECRs) of the 1930s, the advent of the Reserve Bank of India. However, government proceedings demonstrate that definitional problems of hundi plagued the Indian government throughout the British period. Conversely, legislation inevitably left its imprint on the practice of hundi, and this is investigated within the thesis as a whole.

### 1.5 Problems of Definition between 1858-1978

Since the late 19<sup>th</sup> century, hundi has been subsumed within the broader classification of *indigenous banking*. Even the Negotiable Instruments Act (NIA) of 1881, which will be examined in chapter four, subordinated hundi to the murky world of the *indigenous*. However, even this category has not escaped its share of problems. Within the context of South Asia, the term indigenous banking has always proven notoriously hard to delineate. Jain touched upon this in 1929 when he said that there was “no legal definition of the term ‘indigenous banker’ available.”<sup>14</sup> In 1931, the Indian Central Banking Enquiry Committee stated that use of the term *indigenous banker* had done a disservice to India. Its statement rested on information collected by the various Provincial Banking Enquiry Committees, which demonstrated

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<sup>13</sup> See pp. 5-6 for a discussion on how hundi is represented in post-1978 literature.

<sup>14</sup> L.C Jain, *Indigenous Banking in India* (London: Macmillan, 1929). P.1.

the eclectic nature of agents falling within this broad category. It reasoned, did the name *indigenous* carry any real meaning if “different types and varieties of bankers and moneylenders engaged in small functions and large functions, mixed up with land, the trade in precious metals, the trade in grain down to peddling” all fell under the single classification?<sup>15</sup>

In a similar fashion, a definitive understanding of hundi in its functional, linguistic and institutional senses is bound up with an understanding of its primary agents, namely, the Indian merchants themselves. The hundi in its various forms was used extensively both within and around the Indian subcontinent, but in all cases it was linked to Indian merchants or bankers. Hundi’s instrumentality and the mercantile communities which wielded it were largely indivisible. The critical problem remains that Indian merchants themselves have been poorly understood, so it is hardly surprising that their tools and financial operations, and thus hundi, have remained relatively obscure. Here, it is worth citing Stephen Dale who drew attention to the following approach towards Indian merchants:

European scholars have generally seen Indian and other Asian merchants as archaic commercial artefacts of the early modern world. The term peddler has frequently been used to categorise and implicitly denigrate the economic effectiveness of Asian merchants in this period. As it is usually used, peddler represents a kind of economic orientalism in which Asian merchants are viewed as quaint and ineffective commercial “other.” The implicit standard of comparison is, of course, the British and Dutch East India companies. It has been relatively easy for scholars to hold this view because there is a lack of data on non-western merchants before the twentieth century.<sup>16</sup>

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<sup>15</sup> "Indian Central Banking Enquiry Committee, Vol. 1, Pt.2 Minority Report," (Nehru Memorial Museum and Library, 1931), P.100

<sup>16</sup> Stephen Frederick Dale, *Indian Merchants and Eurasian Trade, 1600-1750* (Cambridge: Cambridge University Press, 1994). P.5-6.

There have been several studies on South Asian merchants since Dale's work; and the significance of Indian merchant networks has been elaborated on by the likes of Markovits and Levi in particular. But oddly hundi—a core component of such networks-- has not received the benefit of this focus. It is persistently mentioned in historical literature as we shall see, and yet has never received systematic attention. In many ways hundi remained this oriental "other". David Rudner emphasized this point when he spoke about the stereotyping of the Indian moneylender as an "independent, strictly small-scale entrepreneur whose business activities are confined to credit transactions with his client agriculturalists."<sup>17</sup> Such a stereotype, he felt, "colours the writing of colonial administrators, economists writing during the colonial period, and historians writing today."<sup>18</sup> This kind of perspective is evident in more recent works. David Hardiman's *Feeding the Banya*<sup>19</sup> is one outstanding example of a concentration on rural moneylenders' usurious and exploitative expropriation of peasants' surplus production in exchange for long-standing debts. Rudner points out that this recurring image had negative consequences for the way in which hundi has also been perceived.

Despite its ubiquity and critical importance to trade, the Indian courts during colonial times, concluded that hundis were not unconditionally negotiable. Hundi's indigenous character and the particular rules governing its usage amongst Indian merchants, marked it as different to other financial instruments. The Madras Income Tax Appellate Tribunal had already defined hundi as an instrument that was written in vernacular languages

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<sup>17</sup> David Rudner, "Banker's Trust and the Culture of Banking among the Nattukottai Chettiars of Colonial South India," *Modern Asian Studies* 23, no. 3 (1989). P.419.

<sup>18</sup> Ibid. P.419.

<sup>19</sup> David Hardiman, *Feeding the Baniya: Peasants and Usurers in Western India* (New York: Oxford University Press, 1997); *ibid.*

only.<sup>20</sup> The Indian Negotiable Instruments Act (NIA), passed in 1881, defined hundi as a negotiable instrument. However, it was not affected by the provisions of the act because local usage of instruments in an oriental language, were exempted.<sup>21</sup> Yet, on the other hand, exhibits retained by the Reserve Bank of India, and specimens within the 1971 Report of the Study Group on Indigenous Bankers, reveal that hundis were written in English as well. So again, we are left with the conclusion that hundis were not well understood.

### 1.6 Institutional Analysis

Merchant activity helps us to understand more about credit networks and their relationship to hundi. For centuries the central and organising function of this traditional banking institution was its importance for trade, and not merely as either a credit instrument or remittance vehicle. Trade by its nature involves levels of reciprocity; situations of reciprocity are almost certainly accompanied by forms of agreement, or binding rules, and even formal contracts. All such agreements, rules or contracts, in combination form types of systems, and when the parameters are more distinct or even formalised, we can class such systems as institutions; hundi is one such institution.

To use more contemporary terminology, hundi was characterised by many of the elements which the World Bank has classed as qualities required for a payment system to operate efficiently, for example, *payment certainty, lowest cost, credit risk control, reliability, record maintenance, confidentiality*, and

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<sup>20</sup> Madras ITAT cases: M.K.A. Chimaswamy Nadar & Sons 14 TTJ 546; Grahakshmi & Co. 2 ITD 420, as cited in Dilip Lakhani, "Amount Borrowed or Repaid on Hundi - Section 69D," Laws4India.com, Lex Infotax (India) Pvt. Ltd.

<sup>21</sup> Ibid.

*convenience*.<sup>22</sup> *Payment certainty* was generally high amongst hundi users, despite lacking a legal framework.<sup>23</sup> The system of calculative trust seemed to extend to relationships between hundi merchants and their customers. Higher levels of familiarity with customers were believed to positively influence the *cost* of transactions. For Indian merchants conducting hundi transactions this acted as a measure of *credit risk control*, militating against the risks.

One key reason for hundi being labelled indigenous or different to Western credit institutions was the belief that hundi used minimal or quite erroneously, no *record maintenance*. At any rate, the high level of *confidentiality* preserved by hundi agents made detailed observations difficult. Even now merchant account books remain the preserve of individual merchant families, and access is limited. Scrutiny of some hundi records has demonstrated that record maintenance was normal, but did not necessarily correspond to western book-keeping methods. Markovits infers that, given the volume of correspondence which was exchanged between Sindhi merchants, it was reasonable to assume that a written record of merchant behaviour in past transactions may have existed within the community.<sup>24</sup> It does not require a great leap of imagination to see similarities between this type of documentation and modern credit reporting agencies.

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<sup>22</sup> Official terminology obtained from Robert Listfield and Fernando Montes-Negret, "Modernising Payment Systems in Emerging Economies," in *The World Bank Policy Research Working Paper 1336* (Washington D.C.1994).

<sup>23</sup> Even after hundi disputes entered the British Indian courts, and post-independence Indian courts, hundi transactions were still simultaneously governed by customary rules.

<sup>24</sup> Claude Markovits, *The Global World of Indian Merchants 1750-1947: Traders of Sind from Bukhara to Panama* (Cambridge University Press, 2000).

### 1.7 How did the reputation mechanism work?

At their heart, hundi networks would seem to be much more about calculative rationality rather than 'trust'. Of course there is an implicit trust in the mechanism, in other words, that the flow of information will always exist and be accurate. But such implicit trust exists with—to coin the previous example—21<sup>st</sup> century modern banking services, where banks or credit card companies trust the information provided by credit reference agencies. These flows of information might also be formally documented transactions.

In fact, hundi/hawala was an institution which served Indian merchants particularly well because it embodied economic and cultural sanctions. Seen from this light, it has explanatory power for understanding how mercantile networks have dominated the business world in India for centuries. In his work on one such successful mercantile community, the Marwaris, Timberg emphasises the need to “re-examine the functions of traditional commercial and social values and institutions as they are used by trading communities in the transition to *modern* forms of economic activity”. He suggests that perhaps these very values and institutions have been responsible for the success of commercial communities.<sup>25</sup>

Hundi was one such institution, more obviously facilitating the mercantile network's access to capital, credit and goods; but with a second equally important function of building on and even enhancing merchant reputations, in a kind of harmonious loop. Family reputation as described in chapter one, directly influenced the extent to which a hundi was circulated;

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<sup>25</sup> Thomas A. Timberg, *The Marwaris: From Traders to Industrialists*, New Delhi, Vikas, 1979, P.16.

widespread circulation or usage of hundi by influential persons strengthened the merchant network's status, and increased the merchants' access to capital, credit and goods.

Embodying contractual relations hundi was capable of reducing transaction costs within mercantile networks. Distances breached by a given merchant community and levels of difficulty involved in obtaining or exchanging either capital or goods, were reflected in hundi interest rates, which allowed merchants to control supply and demand. If a good or currency was in short supply, hundi interest rates are likely to have been correspondingly higher. For instance, in the case of the Nakarattars, Rudner writes: "Nakarattar bankers made collective decisions about interest rates that standardised the cost of credit."<sup>26</sup> This kind of calculative rationality pervaded all hundi transactions.

### **1.8 Institutional Theories from an Economic Perspective The link between *Hundi* and the *Commenda***

This dissertation also situates hundi within debates on the institutional foundations of exchange. Douglass North's work on institutions represents one of the most influential economic approaches to the subject. He argues that *agency, protection of goods, standardised mediums of exchange, economies of scale, and impersonal contract enforcement*<sup>27</sup> are all essential issues which a successful institution will address if it is to capture gains from trade. How far did hundi fit this description during the colonial period? One commonly used comparative historical framework, applied in this study to generate an

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<sup>26</sup> David Rudner, *Caste and Capitalism in Colonial India: The Nattukottai Chettiars* (University of California Press 1994). P.95.

<sup>27</sup> Douglass C. North, "Institutions," *The Journal of Economic Perspectives* 5, no. 1 (1991). pp. 98-102.

institutional understanding of hundi, is Greif's model of the medieval Maghribi traders, and enforcement via their multilateral reputation mechanisms.<sup>28</sup>

In much of the literature on trade, we come across the importance of business partnerships. Responsible for facilitating trade across disparate and extended regions, institutionalised business partnerships were a natural response to growing economies of scale. The *commenda*<sup>29</sup>-- a shared partnership and profit structure -- which Greif labelled a private order *coalition network*, is credited with a significant role in the growth of medieval Mediterranean trade.<sup>30</sup>

Yet another related contribution to the scholarship seeks to investigate the extent to which the locational origins of the commenda stimulated institutional migration. This is important because it may help to explain why the multilateral structure of the commenda was used in some contexts, while bilateral and legal frameworks evolved in others. Harris<sup>31</sup> has emphasized spatial and locative factors as a means for understanding the currency of the commenda, while Aslanian<sup>32</sup> has underscored the structure of the family firm. Since neither of these two approaches can be discounted, this would indicate that exogenous and endogenous factors shape institutions.

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<sup>28</sup> See for instance, Roger Ballard's work.

<sup>29</sup> Avner Greif, "Reputation and Coalitions in Medieval trade: Evidence on the Maghribi Traders," *The Journal of Economic History* 49, no. 4 (1989).

<sup>30</sup> Abraham L. Udovitch, "At the Origins of the Western Commenda: Islam, Israel, Byzantium?," *Speculum* 37, no. 2 (1962).

<sup>31</sup> Ron Harris, "The institutional dynamics of early modern Eurasian trade: The commenda and the corporation," *Journal of Economic Behavior & Organization* 71, no. 3 (2009).

<sup>32</sup> Sebouh Aslanian, "The Circulation of Men and Credit: The Role of the Commenda and the Family Firm in Julfan Society," *Journal of the Economic & Social History of the Orient* 50, no. 2/3 (2007).



It was not a structure that was unique to the Maghribi traders however. Other institutionalised partnerships, running along similar principles were also present in other regions. In the Ottoman Empire, the *mudaraba*,<sup>33</sup> as it was more commonly known in the Islamic world, was very important. Undoubtedly there were other terms which referred to this kind of business partnership, and in fact the *commenda* is believed to have possible roots in Jewish, Byzantine and Muslim predecessors.<sup>34</sup> This institution provided the means for business to flourish between agents whose relationships transcended kin, caste or ethnic ties. It enabled an arrangement with an agent or several agents facilitating a loan, through either capital or goods, but also providing a structure for partnership. Profits and risks were mutually borne by both the investor and the agent, in that the investor risked his capital, and the agent his time and effort.<sup>35</sup> In his description, Greif explicitly ascribes a *positivist* (i.e., a descriptive or predictive) reading of the Maghribi traders to the *commenda* to underscore its character as an “institutional foundation of exchange”.

This private order coalition network is described as one in which “trust is related to expectations about behaviour and has to do ultimately with reputation”.<sup>36</sup> The point about such a reliance on reputation is that it was not premised on altruistic trust, but rather on concrete information flows within given mercantile networks. Greif claimed that the “observed ‘trust’ reflects a

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<sup>33</sup> Sevket Pamuk, *A Monetary History of the Ottoman Empire* (Cambridge: Cambridge University Press, 2000).p.83.

<sup>34</sup> Udovitch, "At the Origins of the Western Commenda: Islam, Israel, Byzantium?."pp.198-199.

<sup>35</sup> Ibid.

<sup>36</sup> Markovits, *The Global World of Indian Merchants 1750-1947: Traders of Sind from Bukhara to Panama.*, p.260.

reputation mechanism among economic self-interested individuals.”<sup>37</sup> Using documented evidence, Greif analysed the specific agency relations and contractual arrangements that made self-enforcing reputation mechanisms possible; he concluded that private order coalition networks were established to capture efficiency gains which the market and legal system were unable to secure.<sup>38</sup> Maghribi coalition members were able to conduct business with other agents and merchants because of economic as well as social sanctions implicit within the system.

While Greif does indeed refer to the “social rules” generated by this institution as an “interplay between rules, beliefs, norms and behaviour”,<sup>39</sup> his analysis is inherently positivist precisely because he uses a game theoretic approach to provide a set of principles with which to understand how Maghribi traders regulated their interaction with other people. Utility maximization essentially informs Greif’s perspective.

This influential model conforms in all particulars to North’s definition with the crucial exception of ‘impersonal contract enforcement’. Greif asserted that contractual enforcement within a private-order institution, could successfully take place without recourse to legal institutions, and largely through personal contract enforcement. In other words, the coalition was self-enforcing. Thus, Greif’s work on the medieval Maghribi traders and their reputation-based private order coalition system, was a key argument

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<sup>37</sup> Greif, "Reputation and Coalitions in Medieval trade: Evidence on the Maghribi Traders.", p. 858.

<sup>38</sup> Ibid. pp.866-868

<sup>39</sup> ———, *Institutions and the Path to the Modern Economy : Lessons from Medieval Trade*, Political Economy of Institutions and Decisions (Cambridge ; New York: Cambridge University Press, 2006). P.152.

towards the notion that institutions which made trade possible, could evolve to assign obligations, and provide restitution efficiently without laws.

### 1.9 Enforcement: the Bigger Institutional Question

The issue of enforcement has sparked controversy, notably between Edwards and Ogilvie,<sup>40</sup> (henceforth known as E&O) and Greif.<sup>41</sup> This debate precisely concerns itself with the problem of contract enforcement over long-distance trade with or without legal frameworks. The matter has wide-reaching policy implications for understanding path development of economic institutions in developed and developing countries. The history of hundi within the colonial period provides key insights into this overall discussion. For the colonial government, this issue of enforcement naturally led to efforts towards determining what hundi was, and how it worked in terms of creating and implementing legislation and arbitrating within the courts. Legal case history on hundi, spanning the period 1838 to 1948, is useful for understanding an institution which was previously entirely enforced through customary rules, becoming fused with the British Indian courts. The cases shed light on the kinds of agreements that existed between agents conducting hundi transactions. How should we understand these agreements? What contractual elements characterized these hundi transactions? And what kinds of enforcement were used?

A study of hundi's functioning serves to further theoretical and empirical dialogues on the institutional foundations of exchange. Within the literature

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<sup>40</sup> Jeremy Edwards and Sheilagh Ogilvie, "Contract Enforcement, Institutions and Social Capital: the Maghribi Traders Reappraised," *CESIFO* Working Paper No. 2245(March 2008).

<sup>41</sup> Avner Greif, "Contract Enforcement and Institutions Among the Maghribi Traders: Refuting Edwards and Ogilvie," (Social Science Research Network, 2008).

on contracts and institutions, a dialect between economic and legal approaches appears to exist. From an economic perspective, institutions are largely explained in terms of efficiency and transaction costs, thus taking on a *positivist* approach in their formulations. Legal perspectives however, tend to delve into the elements forming the contractual basis of agreements, and to this end, they also draw on normative characteristics as well as legally coercive qualities as an explanatory variable.

#### **1.10 The significance of the debate between Greif and E&O.**

This is not to say that Greif's account contradicts North's, quite the contrary. The goal of efficiency does deserve greater scrutiny, in so far as personal contract enforcement was the defining framework. In comparing the economic trajectory of the Maghribi traders and his other empirical example of the Genoese traders, Greif attributes the long-run success of Genoese traders to their organizational development. Both trading groups were subject to similar exogenous incentives, encouraging the growth of trade beyond their existing remit. Nevertheless, their ability to do so was respectively constrained or nurtured by endogenous qualities.

The ultimate decline of the Maghribi traders is ascribed to their inability to trade beyond their own network; a characteristic perceived as informed by their cultural values. Unlike the Maghribi traders, the Genoese were able to move beyond intra-economy agency relations in order to develop what Greif has described as the more "efficient" inter-economy agency relations. The incentives for developing this organizational pattern, Greif claims were ultimately engendered by their cultural values: "Collectivist cultural beliefs create a wedge between efficient and profitable agency relations, leading to a

“segregated” society in which efficient inter-economy agency relations are not established.”<sup>42</sup> Notably, Greif’s work, which adopted a utility maximizing, game theoretic approach to institutions, appears to confirm North’s identification of impersonal exchange as a crucial institutional ingredient.

Greif’s model of the Maghribi traders represents a wider debate over whether institutional and economic development can be explained through the use of an informal contract enforcement mechanism. Greif contends that the case of the medieval Maghribi traders is illustrative of how in a given context, informal contract enforcement mechanisms based on collective sanctions can substitute for a legal system. In broader terms, the Maghribi model is represented as one which illustrates how institutions are endogenously determined. Could this coalition network have performed equally efficiently outside the collective? Greif states that it is cultural values which turned the Maghribi traders inward, but equally, one could ask whether the cultural values were shaped by an insufficient legal framework?

Given the wider import of Greif’s work, and its influential character, understandably his work has sparked some criticism about whether indeed a private order institution can provide a viable alternative to a public legal system. E&O’s rejection of Greif’s model represents the flip side of the debate which underscores the importance of the legal system in supporting trade. Referencing the same empirical material, E&O have questioned the basis of Greif’s claims, asserting that the Maghribi traders frequently had

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<sup>42</sup> — — —, *Institutions and the Path to the Modern Economy : Lessons from Medieval Trade*. P. 289.

recourse to legal mechanisms.<sup>43</sup> Indeed, they contend that the reputation mechanism was not sufficiently enforceable, and claim to draw on evidence illustrating widespread use of a legal system to enforce transactions amongst medieval Maghribi traders. In other words, they contest Greif's premise—cultural factors, or endogenously determined incentives—for understanding the institutional foundations of the Maghribi traders, and the subsequent demise of the Maghribi versus the Genoese traders.

### 1.11 The link between *Hundi* and the *Commenda*

Applying Greif's model of the coalition network to hundi stimulates some interesting questions to add to this debate. As a commenda-like institution, at first sight, hundi certainly confirms Greif's belief that legal enforcement was not necessary for transactions within the collective. First, hundi has largely been viewed within the confines of the vast body of literature on prominent Indian family firms,<sup>44</sup> or community and caste as a reinforcing principle of Indian merchant activity.<sup>45</sup> This literature is characterized by a strong focus on primordial relations as a defining feature of Indian merchant family firms. However, the complex organisation of Indian merchants in far-flung locations outside India creates reasonable grounds for thinking that hundi functioned in such a way as to facilitate both intra-economy and inter-economy agency relations.

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<sup>43</sup> J. Edwards and S. Ogilvie, "Contract enforcement, institutions, and social capital: The Maghribi traders reappraised," (2011).

<sup>44</sup> Sanjay Subrahmanyam and C. A. Bayly, "Portfolio Capitalists and the Political Economy of Early Modern India," *The Indian Economics and Social History Review* 25, no. 4 (1988).

<sup>45</sup> Banarasidas, *Ardhakathanak* (1641) (Jaipur: Rajasthan Prakrit Bharati Sansthan, 1981); Rudner, *Caste and Capitalism in Colonial India: The Nattukottai Chettiars*; *ibid.*; C. A. Bayly, *Rulers Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770-1870* (New Delhi: Oxford University Press, 1983).

In common with the *commenda*, hundi embodied negotiability and exchange over long distances within the framework of a contract. Indian merchants in the Turan for instance, are known to have been heavily capitalised, and to have invested in a variety of ventures both within the host country and within India;<sup>46</sup> the sheer scale of their operations must have necessitated the use of agents who were not connected through kinship or caste ties. In all of these conditions hundi had the ability to mitigate the risk of using a third party. But how was it able to achieve this? And how effectively did it mitigate such risk? One way of evaluating this is to adopt an Economics-centric approach.

### 1.12 Hundi as an Economic Institution

Hundi had great reach, particularly when endorsed by merchants with a strong reputation, but how was this reach achieved? It crucially depended on a framework that sanctioned its usage, hence the importance of infrastructure or specialist discounting houses--which are believed to have been well-established and vast<sup>47</sup>--insurance against loss<sup>48</sup>, economies of scale and lower transaction costs. Contemporary studies often regard hundi as a system which evolved to alleviate the need for cash; certainly this was one indispensable quality, but its reputation mechanism and liquidity were corollaries of a more complex institutional framework, of which institutionalised networks, or the multilateral reputation mechanism of the *commenda*, were a part. Let's return to North's description of a successful institution as essentially constituting: *agency, protection of goods, standardised*

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<sup>46</sup> Scott C. Levi, *The Indian Diaspora in Central Asia and its Trade: 1550-1900*, vol. 3 (Leiden: Brill, 2002). chapter four.

<sup>47</sup> Bhattacharya, S., "Eastern India" p.291 IN Dharma Kumar and Meghnad Desai, eds., *The Cambridge Economic History of India* vol. 2: c.1757-c.1970 (Cambridge: 1983).

<sup>48</sup> Bayly, *Rulers Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770-1870*. Chapters eleven and twelve.

*mediums of exchange, economies of scale, and impersonal contract enforcement*,<sup>49</sup> if it is to capture gains from trade. Hundi reflected all of these ingredients, and the different interest rates in operation with hundi also demonstrated more specialised forms of transactions costs. The specific nature of business partnerships or the *commenda* was influenced by the risks and resources provided by the various partners,<sup>50</sup> but this in turn shaped the nature of hundi. So, what of 'trust'?

### 1.13 Reconfiguring Notions of Informality, Formality and Trust

Fukuyama has argued that trust is essentially an outcome of a context in which commonly shared norms generate cooperative and regularized behaviour.<sup>51</sup> For Fukuyama, this trust is a cultural characteristic which tends to degenerate when the institutional context widens. State intervention has tended to dilute the norms of the immediate 'informal' communal or familistic sphere. Going back to the debate between Greif and E&O, a fundamental issue here is: how much importance should we give to endogenous characteristics like customary sanctions, in order to understand institutional foundations and development? To what extent is legal enforcement a necessary quality of inter-economy relations? The crux of this debate lies in the general understanding that legal enforcement is more coercive than customary sanctions. When Greif speaks of endogenous characteristics being shaped by cultural preferences, it would appear that he is referring to social conventions. In Greif's model social conventions or cultural beliefs carry weight because repeated interactions build 'trust' in

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<sup>49</sup> North, "Institutions." pp. 98-102.

<sup>50</sup> Pamuk, *A Monetary History of the Ottoman Empire*.p.83

<sup>51</sup> Francis Fukuyama, *Trust : the social virtues and the creation of prosperity* (London: Hamish Hamilton, 1995).



long-term relationships. The term 'trust', is for instance, not viewed as sufficiently coercive by E&O. There is a sense that E&O regard trust as carrying greater potential for opportunistic behaviour.

An examination of the word *hundi* provides us with some clue as to how we should interpret the words 'honour' and 'trust'. One key reason for this embedded notion of trust, must lie in the etymology of the word *hundi*, which, as described previously, carries the senses of 'trust', as well as 'inclusive agreement' or 'contract'. The whole concept of institutional credibility is based on a form of so-called 'trust'. This notion of 'trust' has undergone a great deal of scrutiny and criticism in scholarly literature.

Greif uses the word 'trust' liberally in his explanation of the reputation-based mechanism of the Maghribi traders. But evidently, in his account there is an important distinction to be had between calculative trust and altruistic trust, where the latter is decidedly more risky than the former. Altruistic trust involves having faith in a largely unknown quantity, motivated by benevolence or idealism. This form of trust we can reason, is much more likely to result in oral agreements which have weak or no penalty mechanisms built in. Calculative trust, on the other hand, is premised on weighing up the costs and benefits of a given quantity, and making a decision based on a number of penalties or fail-safes built into the agreement.

Ultimately, given the calculative quality of this so-called concept of 'trust', one might question whether the term has any utility at all. Williamson for instance, argues that "trust is irrelevant to commercial exchange and that

reference to trust in this connection promotes confusion.”<sup>52</sup> Calculativeness, though frequently used to excess in the field of Economics, is nevertheless useful in limiting usage of the word trust. For Williamson, calculativeness, rather than trust is more useful as a way of characterizing agreements between parties because it is ultimately “pervasive” in transactions. He points out that contracts with built in fail-safes are usually only evident if “cost-effective”, thus calculation is intrinsic.<sup>53</sup>

Similarly, Hardin has rooted himself in this sense of calculativeness, by describing the ‘trust’ which frames transactions as “encapsulated interest”.

I trust you because I think it is in your interest to attend to my interests in the relevant manner. This is not merely to say that you and I have the same interests. Rather, it is to say that you have an interest in attending to my interests because, typically, you want our relationship to continue.<sup>54</sup>

Hardin also draws a key distinction between ‘trust’ and ‘trust worthiness’. The difference between the two concepts underscores a shift from the subject to the object of trust. In other words, person ‘A’ will trust person ‘B’ purely because B has proven himself trustworthy. Thus there is an inherent calculation in both A’s trust in B, and B’s status as trustworthy.

In analyzing opportunistic behaviour, or “finking” as he terms it, Guinnane, in common with Williamson, suggests that psychological and cultural claims on the nature of trust have some value, but provide less specific answers to the question of why “finking” takes place. Guinnane too subscribes to the

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<sup>52</sup> Oliver E. Williamson, "Calculativeness, Trust, and Economic Organization," *Journal of Law & Economics* 36, no. 1 (1993). P.469.

<sup>53</sup> Ibid.

<sup>54</sup> Russell Hardin, *Trust and trustworthiness* (New York ; [Great Britain]: Russell Sage Foundation, 2002). P.4.

notion of encapsulated interest in his understanding of why parties will form agreements. In his analogy the costs of “finking” will outweigh the costs or indeed benefits of fulfilling an agreement. Collateral in this instance is not merely an extra form of security, but also an information device; individuals who risk their assets possess an encapsulated interest.<sup>55</sup>

There is one important instance in which Guinnane suggests that encapsulated interest can fail, and this is where weak incentives provide for weak institutions. Guinnane asks “what can trust teach us about the success or failure of an institution that the economics of sanctions and information cannot”?<sup>56</sup> The empirical examples that Guinnane provides of two credit cooperatives operating with similar economic principles, but with ultimately different outcomes raises a valuable point: if trust in one context leads to institutional success, and trust in another to institutional failure, then we must look at what is informing ‘trust’ in each context.

#### **1.14 The contexts of trust: cultural and normative implications**

This line of thinking brings us back to Greif’s notion that cultural preferences may well underpin the foundations of ‘trust’ espoused within institutions. In common with Greif, Guinnane argues that social context matters, though Greif makes an explicitly economic rather than cultural or moral argument. Can economic rationalizations suffice in understanding institutional trust? Certainly, the previous discussion has demonstrated that within the context of a contractual institution, altruistic forms of trust are very unlikely to be present. But what of normative considerations? What social contexts determine the success or failure of institutions, and how should we interpret

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<sup>55</sup> Timothy W. Guinnane, "Trust: A Concept Too Many," *SSRN eLibrary* (2005).

<sup>56</sup> *Ibid.* P. 12.

these contexts? Do normative and not just economic principles, inform the cultural incentives which make up institutional trust?

Surely, as the discussion so far has indicated, using pure economic rationalizations for understanding the sets of incentives which inform these institutions, is rather reductive. Harriss, for instance, argues that 'trust' is often used in discourse as a means of masking relationships of power.<sup>57</sup> The central thrust of his argument is that hierarchical structures often impact on social networks, thereby either helping to generate trust, or subordinating trust in relationships.<sup>58</sup> As Harriss pinpoints, 'trust' is "polysemic".<sup>59</sup> It must be construed as polysemic because it can espouse "the interplay of habits of thoughts and practice (which is what the idea of culture entails) with formal institutions (defined, conventionally as rules, norms, and conventions – in this case those that regulate economic activity)."<sup>60</sup> Chapter three illustrates this debate with empirical examples of hundi legal cases.

### 1.15 Theories of Colonial Law

Law can be seen as a means for appropriating control over society. How should we comprehend the word 'control'? It is a structure comprising a specific vision of how to order society, and more specifically in this context, a particular vision of ordering market relations. Historians have variously sought to understand what this vision was, how it was engendered, applied, and functioned in the colonial period. They have also focused on looking at the voices or forces which sought to contest, assimilate or appropriate the

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<sup>57</sup> John Harriss, "'Widening the Radius of Trust': Ethnographic Explorations of Trust and Indian Business," *The Journal of the Royal Anthropological Institute* 9, no. 4 (2003). P. 768.

<sup>58</sup> Ibid. P. 764.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid. P. 769.

law. With respect to these voices, recent post-colonial historical work has focused on the delineation made by colonial law on forms of capitalism in the public and private spheres. Such work has directed much greater attention to the effect of governance on indigenous capitalism, and the identity forged by its economic agents in their struggle to gain legitimacy.

Post-colonial studies tend to render the market economy as an object of law and governance. Here the conflict or tension is perceived as having produced economy and culture as 'exclusive, apriori ethico-political arenas.'<sup>61</sup> The market is seen to have emerged as a platform for cultural politics, in response to colonial law. For instance, it is argued that 'colonial authorities regulated vernacular capitalism exactly by coding it as a rarified cultural formation.'<sup>62</sup> Therefore the approach tends to look at how the colonial authorities coded vernacular capitalism. It follows the premise that the law or governance must unilaterally impact on society or institutions. Subsequent analyses seek to measure the impact of such governance by looking for illustrations of its consequences.

Drawing on Partha Chatterjee's notion of 'colonial difference'<sup>63</sup>, Elizabeth Kolsky<sup>64</sup> suggests that laws were created in India to emphasize this sense of difference. Indeed, she goes so far as to state that "a uniform rule of law would have profoundly threatened the power dynamic that distinguished colonizer from colonized"<sup>65</sup>. Although Kolsky specifically goes on to discuss

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<sup>61</sup> Ritu Birla, *Stages of capital : law, culture, and market governance in late colonial India* (Durham, N.C. ; London: Duke University Press, 2009).

<sup>62</sup> Ibid. p. 5

<sup>63</sup> The difference between the colonizer and the colonized.

<sup>64</sup> Elizabeth Kolsky, *Colonial justice in British India* (Cambridge: Cambridge University Press, 2010).

<sup>65</sup> Ibid. P.637.

codification with reference to criminal jurisdiction, this perception of power dynamics must also be tempered with the important codicil that pragmatism had a role to play.

Post-colonialists are right to point out that the colonial history of hundi presents a mixed legal trajectory of both conciliation, mediation and exclusion. However, while such studies examine the impact of such a trajectory, they do not scrutinize how this trajectory was arrived at, and how the objects of such governance, the indigenous--in this case hundi—coloured the trajectory. While these approaches contain their own value, they tend to orient studies towards a form of particularism; a particular understanding of Indian modernity, and a particular understanding of the colonial experience which is wholly tied to one context rather than one which could translate into a better understanding of colonialism, and law-making across multiple contexts. Does 'struggle' in society result in particular statements of private and discrete interest, or can we derive general statements of principle?<sup>66</sup> Some historians have looked at the law and its historical milieu and emphasized the need to draw out the general from the particular.<sup>67</sup> This is ultimately where general principles must prove useful.

One example of this rather ambiguous revival of the "indigenous" is well described in Marc Galanter's account of proposals for the restoration of *panchayats*: village councils.<sup>68</sup> Just as with the hundi system, the panchayat system was officially sanctioned as a means of bridging the gap between the

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<sup>66</sup> D. A. Washbrook, "Law, State and Agrarian Society in Colonial India," *Modern Asian Studies* 15, no. 3 (1981). P.649.

<sup>67</sup> Ibid. P.651.

<sup>68</sup> M. Galanter, "Aborted Restoration of Indigenous Law in India," *Comparative Studies in Society and History* 14, no. 1 (1972).

villager and the legal system. However, the Indian legal community were markedly reluctant to move away from the British legal system: "...the British period gave us a rule of Law beneficial to our interests. If at all we are beholden to anything British, it is their system of Justice and Jurisprudence, that have taken an abiding and glorious place in the life of our country".<sup>69</sup> As for the panchayat system, it was frowned upon and even disdained: "The reform of our Legal Profession and our Legal System does not lie in that way of "Village Panchayat Revival". It is a suicidal policy that will lead only to factions and anarchy".<sup>70</sup>

Galanter's assessment of judicial panchayats led to an adoption of Paul Brass's model of dual modernization: modernization through the pursuit of traditional symbols and values, but with simultaneous engagement in technological and organizational modernization.<sup>71</sup> The revival of the panchayat system effectively worked because of its many borrowings from the modern legal system, i.e.; "statutory rules, specified jurisdiction, fixed personnel, salaries, elections, written records, etc." Galanter concluded: "The movement to panchayats then is not restoration of traditional law, but its containment and absorption; not an abandonment of the modern legal system, but its extension in the guise of tradition."<sup>72</sup> Brass's model of dual modernization, and Galanter's application of this model to the historical revival of panchayats, perhaps presents the most reasonable approach to understanding the issue of hundi codification in chapter seven.

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<sup>69</sup> Ramachandran, V.G., 'Re-Organization of the Legal Profession in India'. *All-India Reporter Journal* 1950:52. Cited by *ibid.* P. 57. To emphasize the influential nature of this attitude, Galanter notes that this essay was awarded the Gold Medal at the Sixth Session of the Madras State Lawyers Conference in Coimbatore, May 1950.)

<sup>70</sup> Ramachandran, p. 53, again cited by Galanter.

<sup>71</sup> Galanter, "Aborted Restoration of Indigenous Law in India." P. 60.

<sup>72</sup> *Ibid.*

### **1.16 Tying the Various Theoretical and Historical Threads Together**

As briefly touched upon, the historical literature reveals that hundis were not well understood by the British Indian government. In large part, this is seen through the ambiguities apparent in the reconstructed historical sources. This does not render the sources any less valuable. The struggle to define hundi and legislate around the instrument provides a critical piece of economic and legal history that helps to bridge institutional and legal-historical literature. Two important insights emerge from the colonial documentation: first, that hundi should be treated as a legal rather than illegal instrument. We can contrast this with the 21<sup>st</sup> century attitude of seeing hundi as a largely illegal entity. Treating hundi as a legal instrument motivated the colonial government's pursuit of how best to regulate around hundi. Second, British Indian courts concluded that hundis were not unconditionally negotiable. Their approach suggests that hundi was not dissimilar to other contracts (such as English bills of exchange), albeit functioning under unknown, or undocumented, and at times context-specific conditionality. The first insight adds an important framework to the use of colonial sources, while the second observation enriches the value of investigating contractual conditionality. The institutionalist literature supplies models of the same kind of contextual conditionality that supported early modern contracts, and is therefore germane to this study.

### **1.17 Primary Sources**

This dissertation is based on archival sources from the India Office Records, London; New Delhi; the State Bank of India Archive, Kolkata (Calcutta); the Reserve Bank of India Archive, Pune; D.R. Gadgil Library, Gokhale Institute of Politics and Economics, Pune; and the Kerala State Archives, Kochi (Cochin) and Kozhikode (Calicut) respectively.



Most of the documents collected consisted of government proceedings, correspondence, reports and legal cases. Merchant papers would have had limitations because the merchant voice would not necessarily expose external dynamics, and more specifically the way in which government affected hundi. Government documents more effectively reveal the evolution of the legal architecture which transposed hundi from a pure communal setting to the realm of the British Indian courts. Private merchant papers could not illustrate hundi's utility to the colonial government or its overall remit. In this sense, several of the government sources I have used in this study represented core documents resulting from the British Indian, and post-colonial government's more systematic attempts to understand the pervasiveness and dynamics of hundi across India. As the overall study demonstrates, the impetus for such systematic government studies arose from a desire to assess how revenue rich hundi was, and how it could be brought under the control of the government. Nevertheless, this bias in the government's approach does not detract from the utility of such studies. Government documents are also essential for situating hundi within the locus of government legislation.

There is a further dimension to the use of government documents, and this is to chart the stamp left on hundi by the British Indian courts. Court cases not only reveal the processes of identifying hundi, but also the processes of grappling with hundi's identity. Recognition could not be accorded to hundi without a systematic process of doing so, which engaged with existing rules applying to hundi. In many ways the court cases both legitimized hundi and recast conceptions of merchant institutions and norms. Government sources proffer a portrait of hundi's function and position within the economy. While this may be a portrait commissioned by the government, it offers

invaluable insights into the identity crafted by the colonial and post-colonial administration.

The description that follows is primarily of the forms of evidence used, since they form the backbone of the thesis. Documents drawn from the Foreign, and External Affairs departments, dating back to the first half of the 20th century, illustrate the breadth and utility of hundi for Indian merchants operating even outside India. They also provide insights into certain government perceptions of hundi, as well as controls and processes of accommodation. Proceedings from the Finance and Commerce department provide an excellent source of documentation on the government rationale for including hundi within the 1879 Indian Stamp Act, along with the practical challenges of doing so. In conjunction with this, the Foreign Department's Internal branch documented some of the jurisdictional, political and economic problems involved with the application of the Act.

Legislative proceedings from the Public and Judicial Branch served the similar function of articulating why hundi should largely be excluded from the Negotiable Instruments Act of 1881. Court cases were chosen which could illuminate some measure of the impact of the NIA and the British Indian courts. These legal cases included in chapters three, four and five endow the thesis with a degree of *real-life* detail, and witness statements also provide an invaluable practitioner's view of hundi. From the cases, we learn much about the kinds of transactions that were carried out by merchants using hundi; and from their recourse to the courts, we can gauge the types of hundi contracts which were traditionally weaker, thus also highlighting the commercial impact of government legislation.

The Provincial and Central Banking Enquiry Committee Reports of the 1930s were invaluable for charting changes initiated by the government in the banking sphere. In many ways, these reports are the first systematic attempt by the colonial government to understand hundi's role in the economy. As such, these reports were richly illustrative of the dynamics, and often head-on collision between modern banks and the indigenous bankers. The State Bank of India minutes also illuminated some of these dynamics.

Finally, the Indian Banking Laws Committee reports illuminate the status quo of hundi, and the legacy of colonial law, just over twenty years after India achieved independence from the British.

### **1.18 Thesis Organization, Themes and Key Theoretical Concepts**

I had several goals in using the material; first to determine how hundi was regarded by the British Indian government, and what, if any, discrepancies lay between their perception of what hundi was, and how it actually operated. The thesis organization follows a thematic as well as largely chronological organization. Three themes run throughout this thesis: definition; formalization; and persistence and change. I highlight the problems of classification and the many misconceptions associated with hundi through the theme of *definition*. In addition to legislative documents, I draw on archival material pertaining to the system's usage amongst Indian merchants. I also scrutinize key legislation affecting hundi, and explore its impact on the process of *formalization*. Finally, I assess the ways in which hundi has demonstrated *persistence* and *change* in the face of formalization.

For the purposes of framing the research and historical context, by using material spanning the 17<sup>th</sup> to the 20<sup>th</sup> centuries in chapter two, I was able to cover a more expansive range of hundi activities. Here I provide an

exposition of hundi's position amongst Indian merchants. I use this framework to direct attention to the myriad problems of definition that have arisen over the years, and to refine our sense of what hundi was. Evidence of how the *Anchal Hundi* postal system operated in the native states of Travancore and Cochin between 1916 and 1948, serves as a means of scrutinizing methods of communication.

Chapter three draws on hundi disputes in British Indian courts in order to perceive some of the mechanics of hundi operations. In using cases which fell within the first half of the 20<sup>th</sup> century; chronology was secondary to the thematic aim of looking at enforcement and the design of contracts. Consequently, the cases date from the early 1800s to the early 1900s. These cases provide an insight into the kinds of agreements that existed between agents conducting hundi transactions. How hundi enforcement and protection mechanisms were conceived through the use of customary rules and also through the British Indian courts, are discussed as a means of focusing particularly on the theme of formalization.

The chief acts which influenced the form and shape of hundi are scrutinized in chapters four and five. Both the Indian Stamp Act of 1879, and the Negotiable Instruments Act of 1881, though created with different purposes, made significant contributions towards formalizing hundi. These chapters also utilize proceedings both predating and following the Acts. Documents preceding the Acts penetrate into issues surrounding the conceptualization of the Acts, whilst those proceedings following the Acts deal with the many issues that subsequently arose. Many of the difficulties of implementing these Acts are well represented in government proceedings, and they also furnish us with much information of what hundi was, and was not.

Although the Indian Stamp Act (ISA) of 1879 classed hundi as a bill of exchange, the Negotiable Instruments Act (NIA) of 1881 implicitly did not. While promissory notes, bills of exchange and cheques are all included as negotiable instruments within the Act, hundi was excluded from its provisions. The exclusion of hundi from the NIA also emphasizes the indigenous origins of the system, the dichotomy between instruments still bound by indigenous customary practice, and the interaction of British colonial laws. Hundi was deemed by the NIA to only fall under the aegis of the Act when local usages and customs were not applicable. Nevertheless, hundi's inclusion within the ISA, and description as a bill of exchange, meant that hundi was already regulated by the British Indian government.

While the ISA ruled on authenticity, the NIA ruled on the particular elements which lent negotiability to an instrument. Issues of endorsement, presentment and liability were chief amongst these elements. As a result of the (growing) number of hundi cases that fell to the courts, the NIA was often referred to when the courts were grappling with articulating the nature and remit of hundi. The Act's provisions were amended several times particularly with reference to hundi, and this chapter shall examine the character of these amendments. We shall also see from court cases, that the application of the NIA set precedents for perceiving hundi's negotiability in all future activity.

Chapter six examines the Provincial Banking Enquiry Committee Reports (PBECRs). These provide the basis for examining hundi in the context of the early 1930s, a period foreshadowing the setting up of the Reserve Bank of India. Prior to the setting up of the Reserve Bank of India, the Provincial Banking Enquiry Committee Reports (PBECRs) of the early 1930s provide a systematic analysis of indigenous banking, and hundi's role within this

sphere. In this chapter, evidence on hundi from the Bombay PBECR is examined as a means of understanding patterns of business. It explores the interaction between the indigenous bankers and the Imperial Bank and government. In particular, I wished to demonstrate the status of hundi and its increasingly marginalization.

Chapter seven continues with the theme of indigenous business practices and state interaction espoused in chapter six. However the emphasis firmly lies in extending the analysis of colonial law into the post-colonial period of 1969-1978. Here the Banking Laws Committee reports of the 1970s, and the Banking Commission Report on Indigenous Bankers published in 1969, provide the basis for assessing the legacy of colonial regulation and institution building. A key question that was debated in all of these reports was how hundi could be better integrated with modern institutions, and whether the Negotiable Instruments Act should be modified to facilitate this. Finally, in chapter eight, I discuss the main findings from each of the chapters.

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## Chapter 2 Hundi's Position Amongst Indian Merchants

The Assistant Commissioner, Ajmere, thinks it undesirable to define the word "hundi," as a complete definition of the word would, he conceives, be difficult to find and be more likely to embarrass than to assist Courts and Revenue officers. (Colonel G.H. Trevore, Chief Commissioner, Ajmere-Merwara, to the Secretary to the Government of India, Finance and Commerce Department, 4th April, 1892.)<sup>73</sup>

This quotation illustrates an acknowledgement by a 19th century official of the complexities involved with understanding and defining the indigenous Indian credit institution and system known as hundi. It also portrays hundi as the object of interest for the purposes of revenue generation and legislation rather than definition for its own sake. So what was hundi? Why did it prove so difficult to define? And why was it important for revenue and legislation?

### 2.1 The Problem of Definition

Hundi crops up in much of the literature on Indian merchants, yet there would seem to be an inherent problem of definition. Most commonly described as a bill of exchange, promissory note, letter of credit, and remittance vehicle, hundi more accurately was both an indigenous credit system and indigenous credit instrument. Simple accounts, exemplified by contemporary descriptions,<sup>74</sup> have dwelt on its use as a credit instrument

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<sup>73</sup> "Decision that legislation is not necessary for the purpose of defining "Bill of Exchange" and "Hundi" in the Stamp Act so as to include "Barati Chittis" or of bringing "Samachari Chittis" within the scope of the Act. Finance and Commerce Department, Separate Revenue, Progs. Nos. 436-602, part A," (April 1893). PP. 1-2. From Colonel G.H. Trevore, Chief Commissioner, Ajmere- Merwara, to The Secretary to the Government of India, Finance and Commerce Department, 4<sup>th</sup> April, 1892.

<sup>74</sup> See Roger Ballard, "Coalitions of Reciprocity and the Maintenance of Financial Integrity within Informal Value Transmission Systems: The Operational Dynamics of Contemporary Hawala Networks," *Journal of Banking Regulation* 6, no. 4 (2005). P.7. Nikos Passas, "Informal Value Transfer Systems, Terrorism and Money Laundering," (National Institute of Justice, 2003). P. 37. Patrick.M. Jost and Harjit Singh Sandhu, "The Hawala

and remittance vehicle alone. Hobson-Jobson's 1903 edition of colloquial Anglo-Indian dictionary describes hundi or *hoondy*, in very minimal terms as "a bill of exchange in a native language".<sup>75</sup> Complex accounts examine the different roles that hundi plays, particularly in relation to various forms of mercantile activity. The Burma Provincial Banking Enquiry Committee Report (PBECR) is one such example. With over fourteen pages devoted to defining hundi in the 1929-30 Burma PBECR, and multiple references to it elsewhere in the text, other contemporary descriptions appear almost cursory by comparison. The Burma report's attention to hundi is no isolated case, nor does it demonstrate a focus that was restricted to its era: the 1971 Report of the Study Group on Indigenous Bankers<sup>76</sup> also devotes over eight pages to defining hundi. Yet, even such complex accounts were still confounded in their attempts to provide a tighter definition of hundi. What complexities surrounding hundi would merit such attention?

Examining methods of indigenous banking in 1929, L.C. Jain too wrote:

Although a hundi has existed from very early times, there is no legal definition of the term available. Section 5 of the Indian Negotiable Instruments Act of 1881 contains the definition of a 'bill of exchange' which is applicable to bills, promissory notes and cheques. The hundis, as a rule, are deemed to lie outside the provisions of the Act. A hundi is governed by the time-honoured custom and usages of the various localities. It is only where no specific customs obtain that a hundi is treated as a 'bill of exchange' within the meaning of the Act.<sup>77</sup>

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Alternative Remittance System and its Role in Money Laundering," (Lyon: Interpol General Secretariat, 2000). P.5.

<sup>75</sup> Henry Sir K. C. S. I. Yule and Burnell, [*Hobson-Jobson: being a glossary of Anglo-Indian colloquial words and phrases, and of kindred terms; etymological, historical, geographical, and discursive.*], New edition, edited by William Crooke. ed. (London: John Murray, 1903).

<sup>76</sup> "Report of the Study Group on Indigenous Bankers," (Bombay: Banking Commission; Government of India, 1971).

<sup>77</sup> Jain, *Indigenous Banking in India*. P.71.



It seems reasonable to surmise that hundi's dominant function has varied over time, closely mirroring the needs of its agents and their political and economic contexts.

## 2.2 Linguistic, historical and functional affinities compared

So what can we understand by hundi? Although, in modern times, the term *hawala*<sup>78</sup> has often been linked to Middle Eastern or Islamic banking, in actual fact, as the following discussion demonstrates, hundi and hawala represent the same entities. This is an important point, and much can be understood about hundi when cross-referenced with literature on hawala. Certainly, a linguistic comparison of hundi and hawala in Hindi, Arabic, and Sanskrit reveals strong affinities and functional similarities.

In modern standard Hindi, the senses of trust, contract and promise are implicit in both hundi and hawala. McGregor's authoritative Oxford Hindi-English Dictionary<sup>79</sup> describes hundi as a bill of exchange, draft, and a promissory note, whilst the entry *hunda* states: "an inclusive agreement or contract", or *hunda-bhadha* as a contract for delivery of goods free of charge, or for insurance. Hawala, as represented by *havalā* in Hindi, is defined as "charge, keeping", or "reference, allusion", and its etymology is attributed to Arabic. Modern standard Arabic translates hawala as *transfer*; in fact, the word hawala is the verbal noun form of the verb *ḥāla*, which means the transformation of a situation in which a person or thing finds itself.<sup>80</sup> Scrutiny of Monier-Williams's Sanskrit-English Dictionary reveals no entry

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<sup>78</sup> Also known as *havalā*, or *havale*.

<sup>79</sup> R.S McGregor, *Oxford Hindi- English Dictionary* (Oxford: Oxford University Press, 1993).

<sup>80</sup> Richard Grasshof, *Das Wechselrecht der Araber: Eine rechtsvergleichende Studie ueber die Herkunft des Wechsels* (Berlin: Otto Liebmann, 1899). P. 37.

for hawala/havala, or hundi. However, *hundika*<sup>81</sup>, the entry most closely approximating hundi, is described as “a bill of exchange, bond, Rajat, assignment or order”, and its etymological roots are ascribed to Persian.

Historical accounts detailing usage of hundi and hawala also strongly point to the two systems being the same. Both were at the heart of trade in India and the Middle East, and both were exercised as the chief banking instrument of merchants. Unlike contemporary descriptions, hawala was not merely a remittance vehicle; it had the same function as hundi, even if linguistic dictionary entries do not convey this sense adequately. Both the 1927 and 1961 entries in *The Encyclopaedia of Islam*, though authored by different individuals, are unanimous in defining hawala as a “bill” or “draft”, “cheque” or “assignment”, by which a transference or claim of debt is made possible;<sup>82</sup> all functions identical to those of hundi.

Although it is impossible to pin down the precise chronology and roots of either hawala or hundi, strong linguistic, political and economic historical connections between India, Persia and the Middle East suggest that similarities between the two systems are not merely coincidental. Arabic’s influence on Persian is well-documented, as is the replacement of Sanskrit with Persian as the administrative language of North India during the Mughal period. Globalization in the form of mercantile trade throughout these regions, in the late modern period is also likely to have had a significant impact on the language of business. For instance, an intriguing

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<sup>81</sup> Monier Monier-Williams, *A Sanskrit-English Dictionary (Etymologically and Philologically Arranged)* (Oxford University Press, 1899). P.1301. See also Northcote Chas Cooke, *The rise, progress and present condition of banking in India* (Calcutta, 1863). P. 21. Cooke too ascribes the name hundi to Persian roots, though his derivation is different.

<sup>82</sup> EI 1927, 1971

*Financial Times* report<sup>83</sup> of 2004 provides the sense that the Arabic term hawala was adopted because of increasing trade activities with the Persian Gulf or Middle East more generally. Reporting on Bahraini settlers in the late eighteenth century, Field describes hawala as the name of Sunni Arabs originating from Arabia, who had settled on the Iranian coast before coming to Bahrain. Most of these settlers are said to have had strong trading connections in a variety of spheres.

Field also relates the arrival in Bahrain of an Indian merchant community. This merchant community had apparently “dealt with the Bahraini pearl traders in Bombay and were drawn to the island by the prospect of buying pearls locally or importing food or other basic supplies to sell to the pearling dhows.”<sup>84</sup> The name hawala may well have been adopted within the Indian subcontinent through active trade with the Persian Gulf in the 20<sup>th</sup> century.

Now that we have established that hundi and hawala are the same, we can also learn much from the conceptions of hawala that exist in the literature. Hawala, we learn from Richard Grasshof through his analysis of Arab exchange laws in 1899,<sup>85</sup> is difficult to define because of its nuanced nature. Indeed, Grasshof recommended caution in the treatment of hawala, emphasising the need to distinguish between hawala as an institution which has been integrated with specific Muslim laws, and hawala’s particular meaning for Islamic culture and economic life.

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<sup>83</sup> Michael Field, "An Island of Mixed Communities," *Financial Times* (retrieved from *Lexus Nexus May 2004*) 1983. Famous trading families of such origin are *Kanoo*, *Almoayed* and the *Fakhroos*.

<sup>84</sup> *Ibid.*

<sup>85</sup> Grasshof, *Das Wechselrecht der Araber: Eine rechtsvergleichende Studie ueber die Herkunft des Wechsels*.

Bei der Abhandlung der hawala haben wir also, um erschöpfend zu sein, folgenden Weg einzuschlagen: zunächst betrachten wir das Institut der hawala, wie es sich, systematisch gegliedert, in dem Kopfe eines bestimmten muslimischen Juristen malt, sehen dann in besonderen Exkursen, welche von der Auffassung dieses Juristen abweichende Ansichten über wichtigere Punkte sich bei anderen finden, und suchen endlich die Bedeutung der hawala für das islamische Kultur – und Wirtschaftsleben festzustellen.<sup>86</sup>

Thus, when examining the havala, in order to ensure thoroughness, we have to follow this procedure: first, we consider the institution of the havala, the way in which it is systematically structured in the mind of a Muslim legal professional. Then we pursue certain issues which will lead us to views on certain points which deviate from those of the Muslim legal professional. Finally, we will at last determine the significance of the havala for Islamic culture and economy.

### 2.3 Hundi's strong link to trade

In more recent literature even this elementary link between merchants, trade and hundi has been understated and ill-defined. For instance, the extent to which hundi was used for trade remained uncertain in the Indian Banking Commission's 1971 report on Indigenous Bankers:

Many regarded the hundi as representing a genuine trade bill and not merely an accommodation bill,<sup>87</sup> but there is nothing in the face of the hundi to indicate that it arises out of a genuine trade transaction, nor is it supported in most cases by any documentary evidence indicating despatch of goods as is the case with bills of exchange. Hundis perform one or other of these three function, viz., they are instruments used to: i) raise money, ii) remit funds and iii) finance inland trade. Because the hundi performs one or

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<sup>86</sup> Ibid. P.15.

<sup>87</sup> Definition of an accommodation bill taken from Wikipedia: "An Accommodation Bill is as its name implies, is a bill of exchange accepted and sometimes endorsed without any receipt of value in order to afford temporary pecuniary aid to the person accommodated." Retrieved: 24<sup>th</sup> August, 2007, [http://en.wikipedia.org/wiki/Accommodation\\_Bill](http://en.wikipedia.org/wiki/Accommodation_Bill).

other of the above essential functions, it has been used throughout the century for generations and its popularity has not significantly waned.<sup>88</sup>

Nevertheless, there is a great deal of evidence to suggest that hundi was the chief indigenous banking system and instrument of Indian merchants. It facilitated both family finance and broader inter-agency relations. An extremely versatile instrument, hundi had much greater negotiability than the colonial government credited it with; throughout history it has been used for a wide range of purposes.

Despite the obvious importance that hundi had for merchants, the 1971 report on Indigenous Bankers reveals that the Indian government and modern banking sector continued to find hundis both perplexing, and difficult to govern. It also sums up the historical problem of defining this indigenous financial instrument:

Hundis are, by and large, instruments in vernacular languages and a number of bewildering local usages govern these instruments, though they are inconsistent with the provision of the Negotiable Instruments Act, 1881. Although a credit instrument dating from antiquity, it has never been defined by any authority on banking.<sup>89</sup>

## 2.4 The Hundi and the English Bill of Exchange

As Austin and Sugihara point out, definitions of credit are in themselves innately complex, particularly within historical contexts.<sup>90</sup> In Austin's definition and categorization credit supplied locally within West Africa

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<sup>88</sup> "Report of the Study Group on Indigenous Bankers." P.47.

<sup>89</sup> Ibid. [NMML], Bombay: Banking Commission; Government of India (1971). P.46.

<sup>90</sup> Austin and Sugihara, "Introduction" p.3 IN Austin and Sugihara, *Local Suppliers of Credit in the Third World, 1750-1960*.

between 1950-1960, he articulates how “meaningful boundaries” were often difficult to draw between the various forms of credit; there is an inherent fuzziness between credit supplied for a range of transactions, which are inevitably linked.<sup>91</sup> More generally, hundi was usually defined and considered a bill of exchange by the British Indian administration. The more scrupulous of government officials saw it as similar to, rather than the same as, a bill of exchange, but were less scrupulous about determining the ways in which hundi departed from a bill of exchange, as well shall see in chapters four and five. Writing in 1960, Habib distinguished hundi from “ordinary” bills of exchange stating that hundi served as an “instrument for raising short term credit repayable at another place”, but that during the Mughal period “it was also employed to transmit money from one place to another.”<sup>92</sup> Jain provides one of the more detailed accounts of types of hundis in operation in North India, and the way in which they worked. Although his stated “Comparison and Contrast with an English Bill of Exchange”<sup>93</sup> concerns itself with form rather than functional differences, his detailed account of hundis elsewhere draws much more compelling points of departure from the English bill of exchange.

One notable difference which Jain highlights is that while the English bill of exchange *must* be an unconditional order, the hundi need not have been. Jain later states that the English bill of exchange was habitually drawn against goods dispatched, while hundi acceptance against goods still required the endorsement of merchant bankers of repute. Nevertheless, Rudner pointed

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<sup>91</sup> Gareth Austin, “Indigenous Credit Institutions in West Africa, c.1750-c.1960”, pp. 95-96 IN *ibid.*

<sup>92</sup> Habib, “Banking in Mughal India.” P.8.

<sup>93</sup> Jain, *Indigenous Banking in India*. P.73.

out that Nakarattar Chettiars (a merchant group operating in South India) could take custody of receipts for goods as a means of collateral. This is discussed in the section on collateral security.

Rudner's account of hundi provides a more incisive analysis of these points of departure. Describing it as a "major Nakarattar<sup>94</sup> financial instrument", and "a kind of bill of exchange"<sup>95</sup>, Rudner highlights its "considerable negotiability".<sup>96</sup> He elaborates on some of the parameters within which hundi operated: the "customary sanctions on *hundi* transactions that are rigorously enforced by multilocal, multiregional, and even multinational communities of businessmen."<sup>97</sup> Rudner's portrayal of hundi usage is embedded in his exposition of linkages between Nakarattar business practice, kinship organization, and religion. In essence, he depicts an instrument that represents the community network, and embodies capital liquidity and assets. Levi on the other hand makes the distinction that while bills of exchange were "unconditionally cashable", hundis took several forms, a few of which were cashable according to certain prescribed circumstances. Some of these circumstances are more clearly seen through a comparison of Jain and Rudner's community specific accounts of hundis discussed later in this chapter.<sup>98</sup>

Hundi's definitional obscurity is well reflected in the PBECR of Burma, in which hundi was particularised as being undefined in law, and "used

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<sup>94</sup> Nakarattar is another term for the South Indian merchant group: the Nattukottai Chettiars, about which Rudner writes.

<sup>95</sup> Rudner, *Caste and Capitalism in Colonial India: The Nattukottai Chettiars*. P.37

<sup>96</sup> Ibid. P.37.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

loosely in commercial and banking circles to mean a credit document in any language emanating from or drawn upon persons carrying on business according to Indian methods.”<sup>99</sup> Here hundi was classified as a credit instrument which is distinguished from promissory notes and bills of exchange.<sup>100</sup> A few pages on hundi was treated with more detail, and defined as a “credit document” which falls into two categories: “*promises to pay*”, and “*orders to pay.*” The first category was classified as that of promissory-notes, although the Burma report indicated this too was contentious given that the Indian Stamp Act only included orders to pay. The second category--that of an order to pay--was also problematic; whereas bills of exchange, as defined in the English sense, and the Negotiable Instruments Act were unconditional orders to pay, the hundi’s meaning here however, was conditional.<sup>101</sup> Confusingly, the reader is now confronted with the possibility that hundi was not actually a bill of exchange. Indeed, the Burma PBECR stated: “in fact a bill of exchange is really a particular kind of hundi, although the Indian Stamp Act inverts this relation by making the term *bill of exchange* include hundis.”<sup>102</sup>

The Burma PBECR’s definition highlights the shortcomings of using British credit instruments as accurate terms of reference for understanding hundi. The terms bill of exchange and promissory note must be understood as approximations of hundi; both characterise the system, but neither fully articulates it. Whether we should indeed view British bills of exchange and

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<sup>99</sup> "Report of the Burma Provincial Banking Enquiry Committee, 1929-30," (Rangoon1930). p.149.

<sup>100</sup> Ibid.p.146.

<sup>101</sup> Ibid. p.150.

<sup>102</sup> Ibid. p.150.



promissory notes respectively as forms of hundi, is perhaps a question worth asking.<sup>103</sup>

Nevertheless, more can be understood about the character of hundi through a more thorough understanding of bills of exchange and promissory notes as they were defined in Britain in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. J.R. McCulloch for instance, draws a distinction between the bank note and bill of exchange which is useful for grasping both the nuances of hundi, and conceptions of its function within the period:

The note is payable on the instant, without deduction—the bill not until some future period; the note may be passed to another without incurring any risk or responsibility, whereas every fresh issuer of the bill makes himself responsible for its value. Notes form the currency of all classes, not only of those who are, but also of those who are not engaged in business, as women, children, labourers, &c., who in most instances are without the power to refuse them, and without the means of forming any correct conclusion as to the solvency of the issuers. Bills, on the other hand, pass only, with very few exceptions, among persons engaged in business, who are fully aware of the risk they run in taking them.<sup>104</sup>

This description, though dating back to 1832 encapsulates many of the modern conceptions of hundi vis-à-vis the modern banking system of the period. Bank notes were regarded as reasonably secure, and fairly

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<sup>103</sup> Sevket Pamuk, for instance, observes that there is an ongoing debate over whether hawala has influenced European bills of exchange Pamuk, *A Monetary History of the Ottoman Empire*. P 6.

<sup>104</sup> J. R. McCulloch, "Distinction Between Bills of Exchange and Paper Money", 1832, IN Mary Poovey, ed. *The Financial System in Nineteenth-Century Britain* (Oxford: Oxford University Press, 2003). P.0.

ubiquitous, whilst the bill of exchange was classed as risky and restrictive, providing currency only to certain business persons. In his account of Indian merchants operating in Central Asia, Levi notes that the acceptance of hundis was always governed by the reputation of the merchant house which had issued the hundi.<sup>105</sup> This is one of the most important distinctions drawn between hundis and the Western bill of exchange, and it is one to which we shall return in chapter two.

## 2.5 Types of Hundis and Rates of Interest

There are in fact, many types of hundi; the diverse function of each hundi makes it difficult to squarely apply the usual labels of promissory note, bill of exchange or system of advancing loans. This was compounded by the Indian government's struggle to document hundi usage and enforcement amongst multiple mercantile communities.

While Jain concerns himself with types of hundis in operation in North India, Rudner's description of the hundis employed by the South Indian Nakarattar merchants shares affinities with Jain's reports of hundi. Both mercantile communities broadly deployed 'payment on demand' hundis and deferred term hundis. The hundis within the two mercantile communities diverged from each other in terms of customary practice and the cultural nuances which shaped the rates of interest and particular functional requirements. Thus, the Nakarattars used a special pay order hundi for dowry payments, as per the community's practice.

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<sup>105</sup> Levi, *The Indian Diaspora in Central Asia and its Trade: 1550-1900*, 3. P. 204.

The need for accounts to be held with specific merchants before hundi transactions could take place, particularly crystallizes from Rudner's description of Nakarattar hundi activity. He likens hundi usage to Americans drawing cheques on their checking accounts. Rates of interest levied on hundis amongst Nakarattars also depended on status, credit and type of account opened.

## 2.6 A Comparison of North Indian and South Indian Hundis

Despite some differences in name, and customs in banking, in essence North Indian merchant hundi systems appear to roughly correspond with those of South Indian merchants. (See Table 2.1 A Comparison of North Indian and South Indian Hundis.)

All merchants had two broad categories of hundi: *demand* or *sight* hundis known as *Darshani*<sup>106</sup> or *Dharsan*<sup>107</sup>, which were payable either straightaway or within a few days of presentation, and *usance* or fixed-term hundis known as *Muddati* or *Thavanai*,<sup>108</sup> whose maturity period might be anywhere between thirty to one hundred and twenty days. Within these two broad categories, individual merchant communities had a number of other classes of hundis, which differed in terms of the type of bearer or drawee, or goods despatched. Understandably, the rate of interest charged would vary according to the type of bearer. Some merchant communities additionally had broad hundi categories which served either a particular function, such as dowry, or were discharged purely for use within the specific merchant

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<sup>106</sup> "Report of the Study Group on Indigenous Bankers." P.47

<sup>107</sup> "Burma Provincial Banking Enquiry Committee Vol. 1: Banking and Credit in Burma," (Rangoon 1930); Rudner, *Caste and Capitalism in Colonial India: The Nattukottai Chettiars*. P.93.

<sup>108</sup> "Report of the Study Group on Indigenous Bankers." P.47.

group.<sup>109</sup> (See Table 2.2: A closer analysis of North Indian Hundis as practised by North Indian Merchant Communities.<sup>110</sup>)

The full range of hundis within key merchant communities, such as the Marwari, Nattukottai Chettiar, Shikarpuri or Multani, and Gujarati shroffs,<sup>111</sup> were so well articulated and implemented, that the 1971 report on indigenous bankers observed, “some of the usages of the hundis are said to give better facilities than corresponding provisions of the Negotiable Instruments Act.”<sup>112</sup> Customs ruling the use of hundis may have varied according to each merchant group, yet irrespective of this, according to the literature on the subject, as seen in the following discussion, seldom did a situation arise where hundis were dishonoured.

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<sup>109</sup> — — —, *Caste and Capitalism in Colonial India: The Nattukottai Chettiars*. PP.93-94

<sup>110</sup> Classification and descriptions taken from Jain, *Indigenous Banking in India*. PP. ...?

<sup>111</sup> Key indigenous banking communities as defined in the "Report of the Study Group on Indigenous Bankers." PP.24-43.

<sup>112</sup> Ibid. P.52.

**Table 2.1 A Comparison of North Indian and South Indian Hundis**

<b>Comparison of North Indian and South Indian Hundis</b>			
Name of North Indian Hundi <sup>113</sup>	Function	Name of South Indian Hundi <sup>114</sup>	Function
Darshani <sup>115</sup>	"Sight" hundis, demand drafts	Dharsan	"Sight" hundis, demand drafts
		Nadappu	"Walking" hundis, unique to Chettiars, cashed at the expediency of the drawee, and payable at the <i>nadappu</i> rate
Muddati	Deferred or usance bills	Thavanai	"Resting" hundis, functioning like short-term certificates of deposit, payable after a fixed period of maturity.
		Pay order hundis	Serving as receipts for dowry payments and drawn against special compound-interest-bearing <i>thavanai</i> accounts known as <i>accimar panam</i>

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<sup>113</sup> Classification and descriptions taken from — — —, *Indigenous Banking in India*. PP.72-73

<sup>114</sup> Classification and descriptions taken from Rudner, *Caste and Capitalism in Colonial India: The Nattukottai Chettiars*. PP.93-94.

<sup>115</sup> This variance in spelling between the name given by Jain and Rudner for "sight" hundis, is almost certainly to do with transliteration differences. The word Darshan or Darśan is a Sanskrit derivation, hence its usage in both North India (Hindi vernacular) and South India (Tamil vernacular).

**Table 2.2 A closer analysis of North Indian Hundis as practised by North Indian Merchant Communities**

<b>Name of Hundi</b>	<b>Broader Classification</b>	<b>Function of Hundi</b>
Dhani-jog	Darshani	Payable to any person – no liability over who received payment
Sah-jog	Darshani	Payable to a specific person, someone “respectable”. Liability over who received payment
Firman-jog	Darshani	Hundi made payable to order
Dekhan-har	Darshani	Payable to the presenter or bearer
Dhani-jog	Muddati	Payable to any person – no liability over who received payment, but payment over a fixed term.
Sah-jog	Muddati	Payable to a specific person, someone “respectable”. Liability over who received payment. Payable after a fixed term
Firman-jog	Muddati	Hundi made payable to order following a fixed term
Jokhmi	Muddati	Drawn against dispatched goods. If goods lost in transit, the drawer or holder bears the costs, and the drawee carries no liability

## 2.7 Political Conditions and Trading Patterns of Indian Merchants

An important recurrent theme in the works of several historians of South Asia is that Indian commercial networks before 1900 were often sophisticated and pervasive. This literature sheds much light on the political conditions, and established trading patterns which made this possible, and also makes reference to the financial acumen of Indian merchants. Markovits defines the merchant network as “a structure through which goods, credit, capital and men circulate regularly”,<sup>116</sup> and also adds that the flow of information constituted a very important dimension of the network. How were these elements knitted together successfully?

We also need to distinguish between different types of merchant networks. While Markovits focused on the need to break down a “unitary notion of a diaspora”,<sup>117</sup> and also critiques the concept of “trade diaspora”,<sup>118</sup> he importantly points to the need to distinguish between ‘circulation’<sup>119</sup> and migration, in other words, transients who moved back and forth between South Asia and other parts of the globe, and people who actually settled abroad. Levi too makes a qualitative distinction between Indian diaspora merchants--those who settled abroad for lengthy periods of time investing their capital--and caravan traders, who, to use the language of Markovits, would have circulated between the subcontinent and other parts of the world with each trade transaction.

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<sup>116</sup> Markovits, *The Global World of Indian Merchants 1750-1947: Traders of Sind from Bukhara to Panama*. P.25.

<sup>117</sup> Ibid. P.7.

<sup>118</sup> Ibid. P.20.

<sup>119</sup> Ibid. P.5.

All this has important implications for how we perceive credit within the merchant network; it needed to be sufficiently flexible and adaptable enough to provide for the merchant network irrespective of its type. And given Markovits's assertion that South Asian merchant studies should not concern themselves with whether South Asian merchants were important, but rather with "how South Asian networks were capable of adapting successfully to a trading world dominated by European capital"<sup>120</sup>, hundi takes on even greater importance. Dale for instance wrote: "The commercial ethos and financial skills of Hindu and Jain merchants in particular show them to have been the equal of any mercantile community or organisation of the period."<sup>121</sup>

Though Dale was referring to a much earlier period, 1600-1750, within the remit of this study, 1858-1978, there is sufficient evidence to suggest that Indian merchants were still significant suppliers of credit. Hundis were not only used to remit funds in the case of the caravan trade, but also to finance other activities either within the host country or countries in which merchant networks had a presence.

Hundi sheds light on both the function of credit within the Indian merchant network, and the nature of credit instruments used by merchants. It also advances an understanding of the institutional character of merchant networks, and in particular, the relations of 'trust', which were so essential to the successful functioning of merchant networks. We may ask, to what

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<sup>120</sup> Ibid. P.19.

<sup>121</sup> Dale was referring to the period 1600-1750. Dale, *Indian Merchants and Eurasian Trade, 1600-1750*. P. 133.



extent did hundi provide the means for Indian merchant networks to persist, and adapt themselves to changing political and economic conditions?

Historical accounts of even the medieval South Asian money market refer to hundis as a key source of trade financing. Not only did the hundi system provide some flexibility in terms of where business was conducted, but it also injected liquidity into commercial transactions, allowing cash to be invested in hundis, with the benefit of these instruments being “fully saleable”.<sup>122</sup> The cost of borrowing money through the hundi, and its accompanying interest or discount rate, reflected the flow of money at any given time.

The chief function of hundi amongst Indian merchants, is largely believed to have been its ability to alleviate the need for specie, particularly when travelling across arduous and often dangerous terrain. This was undoubtedly true of the caravan trade where hundi appears to have served primarily as a letter of credit, or bill of exchange. Examining the Shikarpuri merchants’ caravan trade between 1750 and 1947, Markovits argues that hundi had particular importance because no other credit instrument was available at the time.<sup>123</sup>

However, there are a number of historical texts which illustrate that hundi’s function amongst Indian merchants was more varied both within and outside the caravan trade. In the arresting 17<sup>th</sup> century autobiographical poem the *Ardhakathānak*, the author, a Jain merchant from Jaunpur, describes

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<sup>122</sup> Irfan Habib, "Usury in Medieval India," *Comparative Studies in Society and History* 6, no. 4 (1964). P. 401.

<sup>123</sup> Markovits, *The Global World of Indian Merchants 1750-1947: Traders of Sind from Bukhara to Panama*. P.186.

the use of a hundi which operated rather like a promissory note: "The hundi against which my father had borrowed money earlier in Jaunpur had now fallen due. I received it and paid out the required sum."<sup>124</sup>

Several references are made to hundi in connection with the money market in the 17<sup>th</sup> century. Surat, home to one of the most vibrant commercial communities, along with Agra, the seat of the Mughal empire, and an important up-country business hub, were important both for the Mughals and later for the English Company. This Agra-Surat nexus was significantly facilitated through hundis.<sup>125</sup> While virtually the whole country was served by the hundi network,<sup>126</sup> the Surat hub sheds particular light on hundi's role in the political economy of the 17<sup>th</sup> and 18<sup>th</sup> century. The scale and flexibility of key Indian merchants such as Gujarati merchant Virji Vora in Tripathi's account of the 17<sup>th</sup> century, demonstrates how hundi provided the means for large funds to be transmitted on behalf of both the Dutch and English factors. Despite the political turmoil and commercial collapse in some quarters which followed the Mughal decline, the hundi system nevertheless remained virtually intact. Indeed, new commercial elites which flourished during the transition from Mughal to English Company rule, were precisely able to do so because of the expansiveness of the hundi network.<sup>127</sup>

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<sup>124</sup> Banarasidas, *Ardhakathanak* (1641). P.315.

<sup>125</sup> Hans Walther van Santen, "De Verenigde Oost-Indische Compagnie in Gujarat en Hindustan : 1620-1660" (Thesis \_ Rijksuniversiteit te Leiden, 1982., [H.W. van Santen], 1982).

<sup>126</sup> Dwijendra Tripathi, *The Oxford history of Indian business* (New Delhi: Oxford University Press, 2004). P. 18.

<sup>127</sup> Ibid. P. 30.

One major risk arising from use of the system, was that of bankruptcy affecting any of the parties conducting the transaction;<sup>128</sup> elaborated on in chapter three and five. On the whole, this did not happen often, but political instability could easily bring about such circumstances. Nevertheless, even with the decline of the Mughal empire, the hundi network provided the means for the financing of long-distance trade and also for political factions.

The various European factors recognized the efficacy and extensive nature of hundi networks and frequently had recourse to the system. For instance, Torri's account of the British takeover of Surat castle in 1759,<sup>129</sup> through their reliance on specific Indian mercantile networks, emphasizes the utility of mercantile resources. While Torri does not delve into the hundi network, his work nevertheless captures a portion of the political context within which access to the hundi system would have been an indispensable tool. This is borne out by other accounts which emphasize the British East India Company's reliance on the Indian indigenous economy. One such account describes how the British were highly dependent on hundi operations of the indigenous bankers in order to finance their wars against the Marathas and Tipu Sultan.<sup>130</sup> The connection between North Indian capital, hundi operations and the indigenous roots of the colonial economy has been underscored by other scholars, particularly with respect to the nexus created by the major Indian banking houses across Patna, Benares and Lucknow.

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<sup>128</sup> Om Prakash, *Bullion for goods : European and Indian merchants in the Indian Ocean trade, 1500-1800* (New Delhi: Manohar, 2004). P. 407.

<sup>129</sup> Michelguglielmo Torri, "Mughal Nobles, Indian Merchants and the Beginning of British Conquest in Western India: The Case of Surat 1756-1759," *Modern Asian Studies* 32, no. 2 (1998).

<sup>130</sup> Lakshmi Subramanian, *Indigenous capital and imperial expansion : Bombay, Surat, and the West Coast* (Delhi: Oxford University Press, 1996).

The capital that flowed in from these important trading centres, in turn helped to strengthen British commercial interests in Bengal.<sup>131</sup>

Hundi in the sense of a promissory note was remarkably ubiquitous, and certainly in the late 18<sup>th</sup> century, commercial agents of the East India Company regularly used to accept “hoondian on bills granted by the Shroffs”, for delivery of cash, which were later payable in silver from the Company treasury.<sup>132</sup> The use of hundis by the British also had the effect of socially elevating Indian trading families.<sup>133</sup> This suggests that the ubiquity of hundis was strongly connected to merchant reputation and vice versa. Hundis could have great reach if ratified by a merchant community of great repute; similarly, the circulation of hundis issued by specific merchant communities, served to further the network’s reputation.

During the late 18<sup>th</sup> century, there was a sanguine relationship between North Indian merchant capital in the form of hundi and the flourishing of the British East Indian Company. Hundi transactions were highly versatile providing for military and administrative expansion into the rural heartland, as well as important towns.<sup>134</sup> Bayly is among those who regard the British administration’s later replacement of hundi with district treasury bills as a sign that links between Indian merchants and the British had attenuated.

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<sup>131</sup> Bayly, *Rulers Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770-1870*.

<sup>132</sup> Accountant Generals' Office correspondence to Earl Cornwallis K.G., Governor General in Council in the Public Department of Fort William, 11th June 1789.

<sup>133</sup> — — —, *Rulers Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770-1870*. P.241. See also Kumkum Chatterjee, *Merchants, politics, and society in early modern India : Bihar, 1730-1820*, Brill's Indological library, v. 10 (Leiden ; New York: E.J. Brill, 1996).

<sup>134</sup> Bayly, *Rulers Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770-1870*. P.211. See also Lakshmi Subramanian, "Banias and the British: The Role of Indigenous Credit in the Process of Imperial Expansion in Western India in the Second Half of the Eighteenth Century," *Modern Asian Studies* 21, no. 3 (1987).

Yet, as we shall see, certain historical documents reveal that the British remained dependent on a number of merchant communities for trade. District treasury bills never succeeded in replacing the use of hundi amongst Indian merchants.

It was not just long-distance trade that benefited from the hundi network: the wholesale grain and grocery merchants of Gangetic Patna in the late eighteenth and nineteenth centuries diversified into banking, making use of hundis to engage in rapid turnover of their trade. Hundis were also used to purchase from, and advance credit to cultivators,<sup>135</sup> as well as to finance the movement of commodities.<sup>136</sup>

Cooke's late nineteenth century account of Indian banking, articulates the prominence of *hoondees* for exchange operations in "every important city".<sup>137</sup> As a direct consequence of hundis' pervasiveness, during the eighteenth and early nineteenth centuries, important institutions like the Bank of Bengal also had to engage in accepting and discounting hundis, despite the fact that this was not without its share of problems.<sup>138</sup> Since the customs governing the acceptance and presentation of hundis could differ quite significantly from British bills, the Bank was required to evolve other methods for handling hundi business.<sup>139</sup> In the Madras Presidency too, hundi served the

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<sup>135</sup> Anand A. Yang, *Bazaar India: markets, society, and the colonial state in Gangetic Bihar* (Berkeley: University of California Press, 1998). PP.237-238.

<sup>136</sup> Amiya Kumar Bagchi, *The evolution of the State Bank of India : the roots, 1806-1876. Part 1 , The early years, 1806-1860* (Bombay: Oxford University Press., 1987). P. 31.

<sup>137</sup> Cooke, *The rise, progress and present condition of banking in India*. P. 81.

<sup>138</sup> Bagchi, *The evolution of the State Bank of India : the roots, 1806-1876. Part 1 , The early years, 1806-1860*. Also — — —, *The evolution of the State Bank of India. Vol.2, Era of the presidency banks, 1876-1920* (Walnut Creek: Altamira, 1997).

<sup>139</sup> — — —, *The evolution of the State Bank of India. Vol.2, Era of the presidency banks, 1876-1920*. P. 141.

important function of funding trade in the interior, but also competed with the Bank in this capacity. Nevertheless, by discounting their hundis with the Bank of Madras, the indigenous bankers were able to obtain loans to finance trade.<sup>140</sup>

Rajat Kanta Ray's seminal work on the importance of the Indian 'bazaar' also does much to situate the importance of hundi within the Indian economy in the nineteenth and early twentieth centuries. Delving into a wide range of material including the PBECRs, Ray fleshed out an understanding of the Indian 'bazaar' which dispelled J.C. Van Leur<sup>141</sup> and Clifford Geertz's notions of "peddling and petty credit transactions".<sup>142</sup> Complex and highly organized, the bazaar in South Asia was widely understood as a different entity to that encountered by Van Leur and Geertz. This particular type of bazaar formed the backbone of Indian indigenous banking. Ray used his analysis of the bazaar to refute J.H. Boeke's thesis that Indian business or merchant communities were "the bastard products of fully developed Western capitalism".<sup>143</sup> Moreover, Ray rejected the duality espoused by Boeke with respect to Asian and European trade in the nineteenth century.

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<sup>140</sup> Ibid. P. 436.

<sup>141</sup> J. C. van Leur and Instituut Voor De Tropen., *Indonesian trade and society : essays in Asian social and economic history* (Hague: van Hoeve, 1955). Clifford Geertz, *Peddlers and Princes. Social change and economic modernization in two Indonesian towns. [With plates.]* (pp. viii. 162. University of Chicago Press: Chicago & London, 1963). Clifford Geertz, 'Suq: the bazaar economy in Seffrou', in Clifford Geertz et al., *Meaning and order in Moroccan society : three essays in cultural analysis* (Cambridge: Cambridge University Press, 1979). All references cited in Rajat Kanta Ray, "Asian Capital in the Age of European Domination: The Rise of the Bazaar, 1800-1914," *Modern Asian Studies* 29, no. 3 (1995).

<sup>142</sup> — — —, "Asian Capital in the Age of European Domination: The Rise of the Bazaar, 1800-1914." P. 552.

<sup>143</sup> Julius Herman Böke, *Economics and economic policy of dual societies as exemplified by Indonesia : revised edition of The structure of Netherlands Indian economy and The evolution of the Netherlands Indies economy* (Haarlem: Willink, 1953). Cited in Ray, "Asian Capital in the Age of European Domination: The Rise of the Bazaar, 1800-1914." P. 451.

Most importantly, Ray frames hundi as an important instrument facilitating those critical skills of banking and accountancy that were unique to key mercantile communities and their networks. In his rendering of the bazaar, *hundi* alongside *arhat* - the commission agency, is presented as one of two primary pillars. Labelled “the central device of the bazaar”,<sup>144</sup> Ray devotes some considerable space to explaining how hundi constituted a “binding factor”.<sup>145</sup>

An undeveloped transport and communication infrastructure across India significantly impaired the reach and overall competence of modern banking,<sup>146</sup> perhaps explaining why hundi remained an established feature of the Indian economy more generally during the 19<sup>th</sup> century. In the nineteenth century, the hundi system employed its own couriers across the breadth of the country knitting India’s domestic economy together through its networks. Some historians rather erroneously believe that the advent of the railway, cable and the telegraph subordinated the use of hundi by the late nineteenth century,<sup>147</sup> yet British colonial government records attest to the continued mainstream use of hundi by Indian merchants well into the twentieth century. Judging by the way that contemporary hundi/hawala has adapted itself to modern technology for faster transmission of money and information, it is entirely possible that the railway, cable and telegraph positively affected the efficiency of hundi operations. In fact, as the accounts

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<sup>144</sup> — — —, “The Bazaar: Changing Structural Characteristics of the Indigenous Section of the Indian Economy before and after the Great Depression,” *Indian Economic and Social History Review* 25 3(1988). P. 304.

<sup>145</sup> Ibid.

<sup>146</sup> S.M Dhume, *The Evolution of Banking in India Part II* (Bombay: Examiner Press & Publishers, 1926). P.98.

<sup>147</sup> Rajat Kanta Ray, “Indigenous Banking and Commission Agency in India's Colonial Economy,” in *Money & Credit in Indian History*, ed. Amiya Kumar Bagchi (New Delhi: Tulika Books, 2002). P.119; Dhume, *The Evolution of Banking in India Part II*. P.98.

below demonstrate, the Government of India had attempted to find ways of replacing the use of hundi within trade on several occasions, with no success.

## 2.8 Hundi Proved Difficult to Substitute

In 1908 the Government of Bombay “strongly opposed” the suggested adoption of “a system of exportation of opium in bond”, as a substitute for the hundi system. The reason for this considerable resistance was that this alternative bond system was seen to entail “the payment of a stamp duty at a higher rate than that leviable on a hundi.” It was also found that the exportation in bond would not circumvent the problem of interest lost through the hundi system.<sup>148</sup> There were other more compelling reasons for rejecting the introduction of the bond system: the strength of the hundi system amongst merchants in Bombay, and the system’s ability to “afford protection in transit” whilst demanding expenditure which was “a mere trifle compared with the value of trade”.<sup>149</sup>

Trade between Afghanistan and India reached a virtual stand-still when the Afghan government stopped the issue of *exchange hundis* on Peshawar in 1940. Hundi represented the primary form of Indian exchange, since Afghan law prohibited merchants from bringing Afghan or British currency to India from Afghanistan. The precise impact of this on Indian traders and the local economy is described as follows:

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<sup>148</sup> "Correspondence from Lieutenant -Colonel H. Daly, Agent to the Governor General in Central India and Opium Agent in Malwa, to The Secretary to the Government of India, Finance Department, 9th January 1908, Progs., No. 234, Foreign Department, Internal Branch, 1, Part B.," (1908).

<sup>149</sup> "Correspondence from the Chief Secretary to the Government of Bombay, to the Honourable Agent to the Governor General in Central India, 18th December 1907, Foreign department, Internal Branch, Progs. no.121, 4, Part B.," (April 1908).



These firms and others, who are dealing with Afghanistan say that money between 15 to 20 Lakhs has been lost in Afghanistan, and that the business has suffered badly because neither are they able to make purchases nor dispense with their servants, carters etc. They also state that if this state of affairs continues it will dislocate the market and lead to the commission of crime because of the unemployment of many people.<sup>150</sup>

In 1945, the Government of India revoked a customs notification which prohibited all legal currency tender, including cheques, hundis and all other bills of exchange, from being brought into British India across its customs frontiers in the east of India and north of Assam, without explicit permission.<sup>151</sup> Correspondence from the Governor of Assam's office to the Finance department sought to highlight the extreme difficulty this would impose on trade within the region between Tibetan and Chinese merchants:

3. Hundies and bills of exchange provide these traders with the greatest portion of their purchasing power and almost all larger traders bring such hundies mostly on firms at Kalimpong. It is impossible for these traders to obtain the necessary permission of the Central Government or of the Reserve Bank of India before entering India.

4. If this order is to be put into force hundies, bills of exchange, Indian coins and currency notes cannot be brought into India and this will stifle 80% of the trade now being carried on, and will create adverse feeling in South East Tibet and in the long run throttle trade between Mishmis and the Zayuli Tibetans.<sup>152</sup>

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<sup>150</sup> Express letter from the Chief Secretary to Government of the North West Frontier Province, to the Foreign Office in Simla, Progs. nos. 521-F, External Affairs, Frontier Branch., July 15 1940.

<sup>151</sup> "Rose, W.A - Under Secretary to the Government of India to The Secretary to the Governor of Assam, Shillong, 24th April 1945, C. No.114-Cus. II/45. Sadiya Frontier Tract - Hundies and bills of exchange brought by Tibetan and Chinese Traders coming via Lohit Valley route - Prohibition against - Relaxation of. External Affairs, Central Asian, Progs. nos.491-X,," (1937).

<sup>152</sup> "Letter no. L.30/45 G.S from Adams, P.F, Esqr., Secretary to the Governor of Assam, to The Joint Secretary to the Government of India, Finance Department (Central Revenues), Shillong, the 27th March, 1937, Progs. nos.491-X, External Affairs, Central Asian Branch,," (1945).

From the state of affairs outlined by government officials in their formal exchanges, three points emerge. First, the government brought this customs rule into effect in order to establish control over currency circulation, clearly with little foresight over its probable effect. Hundis and bills of exchange are revealed as the key source of merchants' purchasing power, and therefore the customs order would have the effect of throttling 80% of trade being conducted.<sup>153</sup>

Second, this rule was also exercised with little prior understanding of the significance of merchants' prevailing means of transaction. Merchant firm networks and/or branch offices operated across the region. Third, there is a sense that government officials were—prior to the customs order—rather oblivious to the agents of trade within the region. The Political Officer of the Sadiya Frontier Tract (one of the regions across which the customs prohibition applied), subsequently appraised the Finance Department of the true state of affairs:

...the medium of exchange of the Tibetan and Chinese traders who come into the Sadiya Frontier Tract and Assam via the Lohit Valley route are:

a) Hundies and bills of exchange issued by firms in Tibet and China on other firms or their branch firms in India chiefly at Kalimpong and Calcutta.<sup>154</sup>

From his report, we learn that hundis were drawn on these various networks and interlocking firms, by merchants from such diverse regions as China, Tibet, as well as India. Thus, hundis served as an indispensable form of

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<sup>153</sup> "Rose, W.A - Under Secretary to the Government of India to The Secretary to the Governor of Assam, Shillong, 24th April 1945, C. No.114-Cus. II/45. Sadiya Frontier Tract - Hundies and bills of exchange brought by Tibetan and Chinese Traders coming via Lohit Valley route - Prohibition against - Relaxation of, ," (External Affairs, Central Asian, Progs. nos.491-X, 1937).

<sup>154</sup> Ibid.

currency for trade within the region, and must have been critical to the normal functioning of merchant accounts held within different firms in multiple locations.

In the Burma PBECR of the 1930s, colonial administrators describe hundi as a "credit document in any language emanating from or drawn upon persons carrying out business according to Indian methods."<sup>155</sup> It is the latter description--Indian methods--which is important and denotes a sense that hundi and indeed Indian methods of doing business were alien to colonial administrators. Nevertheless, Indian mercantile activity in Burma, and the economic benefits that therefore accrued to India, were so strong, that the term indigenous banking within Burma referred purely to Indian mercantile methods and activities, prompting as we have seen, the Burma PBECR.

Whilst the Burma PBECR informs us that hundi and Indian methods of business were significant in Burma, its authors also conclude that it was more desirable for a non-compulsory standardization of bill forms to be advanced. Although they did not think hundi was primitive, their recommendation does suggest that they thought its multiple forms were inefficient or even a duplication of resources. However, the tentative nature of their recommendation also indicates that the authors were not entirely certain of the precise benefits which hundis provided, and therefore the consequences of doing away with the hundis in their multiple forms.

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<sup>155</sup> "Report of the Burma Provincial Banking Enquiry Committee, 1929-30." p.149.

But we are averse to making the use of the standard form compulsory. If the form provided is a good one it will win its way without compulsion; if its use is voluntary its popularity will be continually a gauge of its suitability. We think it inadvisable to confine all the multifarious activities of the country which use bills of exchange to one narrow groove, and that any rule proscribing an inconvenient standard form compulsorily will be evaded by an ostensible modification of the contract in some unimportant way or will defeat the efforts made to popularise bills.<sup>156</sup>

By “popularise”, the authors clearly hoped to bring the functions of the hundi into what they felt was a more mainstream environment, namely the Western banking model.

Within the literature on Indian money markets, it is also possible to find several incorrect or narrow descriptions of hundi. These descriptions demonstrate that an understanding of hundi’s function apparently tends to deteriorate over time. In 1967, Gopal Karkal, the author of *Unorganized Money Markets in India*--a title which in itself provides misgivings--provided the following comparison between hundis and bills of exchange:

Bills are usually drawn in overseas trade, but hundis finance domestic trade. Hundis are rarely supported by documentary evidence; the bills without documentary evidence are not accepted. A bill is drawn in respect of a specific trade transaction, while a hundi can be used for raising or remitting funds. A bill is considered a highly liquid asset, but hundi is not recognized by the Reserve Bank as liquid asset and hence it only has restricted negotiability.<sup>157</sup>

There are several contentious points here; firstly, hundi was not simply used for domestic trade, but was practically indispensable for Indian merchants in overseas trade as we have already seen. Similarly, hundi was not simply

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<sup>156</sup> Ibid. p.158

<sup>157</sup> G.L. Karkal, *Unorganized Money Markets in India* (New Delhi: Lalvani Publishing House, 1967).

used for raising or remitting funds,<sup>158</sup> but was core to trade transactions. Once again there is a sense that hundi and Indian banking methods were peripheral.

C.A. Bayly also underscores the perceived marginal status of Indian financial methods, when he states that Indian mercantile institutions, though not primitive, were limited because “merchant society operated on strong lines of communication which impeded the entrance of outsiders and limited their capacity to pool and use capital accumulated in society at large.”<sup>159</sup> According to Bayly this meant that Indian merchants were often wary of high-risk opportunities. Yet Austin and Sugihara reveal that increasing sophistication has been evident in the credit transactions of long-distance trading networks in West Africa, seventeenth to eighteenth-century India, China and Japan.<sup>160</sup>

Scott Levi writes of Indian merchants in Turan taking advantage of emerging opportunities by “diversifying their investments in various commercial ventures across a number of regions and by expertly utilizing the fiscal technologies of the time.” Crucially he argues: “even more important than these merchants’ transregional movement of commodities was their exportation to distant markets of large amounts of Indian

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<sup>158</sup> This narrow definition of hundi is also employed by Om Prakash, “System of Credit in Mughal India”, p.48; Najaf Haider “The Monetary Basis of Credit and Banking Instruments in the Mughal Empire”, p.67; and A.R. Kulkarni, “Money and Banking under the Marathas”, pp.113-115, IN Amiya Kumar Bagchi, ed. *Money & Credit in Indian History* (New Delhi: Tulika Books, 2002).

<sup>159</sup> Bayly, *Rulers Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770-1870*.p.409-10.

<sup>160</sup> Austin and Sugihara, “Introduction” pp. 8-9 IN Austin and Sugihara, *Local Suppliers of Credit in the Third World, 1750-1960*.

investment capital and money lending technology.”<sup>161</sup> Through Levi’s accounts we also learn that hundi was a particularly significant technology for the circulation of credit and capital by Indian diaspora merchants in Turan.<sup>162</sup>

As mentioned previously, political conditions also affected these networks, which considerably influenced the liquidity and negotiability of hundi at any given location or time. A petition to the British Indian government from Shikarpuri merchants operating in the Persian Gulf exemplifies the impact of political conditions on hundi’s integrity and negotiability. When in 1915, war was waged against the British in Central and Southern Persia, Indian merchants operating as British subjects in Southern Persia, became casualties of the war. The exchange rate of hundis dropped considerably, giving rise to major losses of income.

The exchange rate of Hundis has fallen in that we used to get 28½ British rupees for 100 Persian rupees in Bombay but now we get 21 or 22 British rupees for 100 Persian rupees. We therefore respectfully request that income tax levied from us may be remitted, as each merchant has suffered a loss of 25 to 30 thousand rupees, for which enquiry may be made from the British Consul.<sup>163</sup>

The means of communication via telegrams also become compromised and more costly.

Formerly telegrams were sent in code words, whereas now we have to send open telegrams and pay Rs4 or 5 against Rs 1-1-0 paid before for each word. We request that a reduction may be made in the rate of telegram charges. Besides by sending open telegrams trade suffers.<sup>164</sup>

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<sup>161</sup> Levi, *The Indian Diaspora in Central Asia and its Trade: 1550-1900*, 3. P.183.

<sup>162</sup> Ibid.pp.203-205.

<sup>163</sup> "Foreign and Political Department, External Branch, Proceedings Nos. 131-133, Part B, March," (1916).

<sup>164</sup> Ibid.

## 2.9 Communication

The dissemination of information was a critical component of the hundi system. There are various methods by which this was achieved, but above all, for the integrity of the hundi system to remain unimpaired, communication needed to be secure, quick and cost-effective. Rajat Kanta Ray argues that Indian merchants used their own special couriers because "they distrusted the European post".<sup>165</sup> However, this was not the case. The hundi system may well have had its own couriers and networks, but it also made use of existing transportation systems, where those systems were well established, efficient and cheap. Moreover, the growth of the postal system meant that it often had a reach that potentially surpassed special courier systems. While courier systems could operate where hundi hubs already operated, the postal system could promote the growth of fresh hubs.

Indigenous to the states of Travancore and Cochin, the Anchal postal system was also used extensively for hundi operations. There is conflicting information regarding the date on which the Anchal transportation system was first established. The Travancore and Cochin State Manuals respectively state that it was already in operation, albeit in a rudimentary way, even in 1729 in Travancore<sup>166</sup>, and 1791 in Cochin.<sup>167</sup> However, some accounts suggest that the Anchal system was set up by a British officer, Colonel John Munroe, in 1811 in Travancore.<sup>168</sup> On the other hand, Cochin state

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<sup>165</sup> Ray, Rajat Kanta, 'Indigenous Banking and Commission Agency in India's Colonial Economy, p. 119 IN Amiya Kumar Bagchi, *Money and credit in Indian history from early medieval times* (New Delhi: Tulika, 2002).

<sup>166</sup> S.T.K Velu Pillai, *The Travancore State Manual*, 2nd ed., vol. IV (The Government of Travancore, 1940). p.254.

<sup>167</sup> C. Achyuta Menon, *The Cochin State Manual* (Government of Kerala, 1911 (reprint 1995)). p.469.

<sup>168</sup> "Anchal Aapees," Kerala.com, [http://www.kerala.com/kerala\\_history/Kerala\\_History\\_sidelights.php](http://www.kerala.com/kerala_history/Kerala_History_sidelights.php).

government documents indicate that it was only introduced in the Cochin State in the year 1913.<sup>169</sup> There is no obvious reason for this conflict of dates. More importantly, in 1940, the Anchal system, particularly that operating in Travancore, was the cheapest postal system in India.<sup>170</sup> It consisted of a network of Anchal postmen/couriers who made deliveries on foot. Oral accounts attest to the postmen running to their destinations and announcing their arrival by ringing a hand bell, though mail boxes were also in evidence. The 1944 Anchal Act of Cochin, demonstrates that the volume of hundi traffic via the Anchal system was significant enough to merit a dedicated section on hundi, outlining legal provisions for the carriage and receipt of hundi.<sup>171</sup>

According to the rules, it seems apparent that the Anchal system was primarily for the use of smaller value hundis. It would also appear that merchants using Anchal did not have full autonomy over their hundis. One of the conditions of the Anchal Act was to allow the government to prescribe the following:

- (a) the limit of amount for which hundies may be issued;
- (b) the period during which hundies shall remain current; and
- (c) the rates of commission or the fees to be charged on hundies or in respect thereof.<sup>172</sup>

Thus the cost-effectiveness of Anchal was not without its own practical costs. On the other hand, the Anchal system provided a measure of formalization to the important matter of hundi communication. The Act outlined

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<sup>169</sup> "Anchal Hundies -- Commission -- Enhancement of," (Huzur Secretariat Records, serial no. 55, file no. and year 2919/19, book No. 118., April 4 1946).p.213.

<sup>170</sup> Pillai, *The Travancore State Manual*, IV. P.260.

<sup>171</sup> "The Cochin Anchal Act ", (Code XVII of 119 (1944) ).Chapter VIII.

<sup>172</sup> Ibid.Section 38, point (2).



regulations geared towards protecting Anchal employees, and therefore the Government, from liability. It also stipulated that it had the power to make rules governing transactions between Cochin State and any other State. For merchants too, there were certain safeguards built into the Anchal system. In the event that any payments in relation to a hundi, were overpaid or paid to the wrong person, that recipient was liable to refund the amount. The government in all cases earned hundi commission through the use of forms and Anchal stamps which were necessary for hundi transactions. Certainly, the government's design of the Anchal system with respect to hundi, was very much in keeping with its system of levying Indian Stamp duty, which we shall examine in chapter four.

## 2.10 Conclusion

All of this raises the question of whether, and if so, to what extent hundi played a part in enabling Indian merchants to maintain their primacy as indigenous bankers. This is rooted in an understanding of hundi itself. Most definitions of hundi are circumscribed to the categories of bill of exchange, promissory note, and remittance vehicle; these square pegs are fashioned out of commonly perceived attributes and uses of the system. I have outlined the multiple sense of hundi, along with some of its ambiguities, and nuances; this provides some context for understanding why it is problematic to use the names of British credit instruments as a reference point for understanding hundi.

It is also clear that hundi's strong link with trade has been poorly defined. In this discussion I have even asserted that hundi was the principal banking system and instrument of Indian mercantile networks because of its negotiability, ubiquity and adaptability to customary and economic sanctions. Since hundi was not a new phenomenon, its networks were also

well established, often providing levels of efficiency that were hard to substitute or compete with.

However, the thrust of this discussion must be that in serving as credit for the merchant network, and tying together merchant reputation, goods, and information, hundi should be seen as both an indigenous banking instrument and system. This system espoused relations of trust, a distinct institutional character, legal and customary norms, in order to facilitate its negotiability and position within indigenous banking. This will be seen in chapter three.

### Chapter 3 A Contractual Perspective Of Hundi

Hundi disputes did reach the legal courts during the colonial era. The advent of such cases is noteworthy in signalling a transition from purely customary rules to common-law based legal sanctions in the enforcement of hundi transactions.<sup>173</sup> The sheer body of hundi legal precedent built up in the British Indian courts must, at the very least, demonstrate that resolution through the courts became no isolated or insignificant matter. As we shall see from chapter seven, eventually in post-independence India, formal representation through a hundi code was regarded as desirable by major shroff (indigenous mercantile) associations.

Some historians have highlighted that traditionally, legal approaches to hundi have been blindsided by court sanctions and judgements, neglecting the substantial negotiability of this instrument.<sup>174</sup> Undoubtedly, customary sanctions must have been remarkably effective for the institution to have survived for centuries. However, this once again prompts the question of why hundi legal enforcement gained currency.<sup>175</sup> The issue here is not whether customary sanctions lost currency, but rather why they were insufficient in those cases brought to the courts. The main corpus of this

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<sup>173</sup> Determining the magnitude of such legal dispute resolution is not something that can be established without knowing how many hundi disputes were brought to the British Indian courts, versus those that were resolved using customary sanctions alone. This question must therefore lie outside the remit of this thesis.

<sup>174</sup> David Rudner has argued that the legal approach “simply ignores customary sanctions on hundi transactions that are rigorously enforced by multilocal, multiregional and even multinational communities of businessmen.” “Rudner, *Caste and Capitalism in Colonial India: The Nattukottai Chettiars*. P.37.

<sup>175</sup> We must assume it gained currency given the body of hundi precedent that evolved in the courts. The question here is not whether customary sanctions lost their importance, but whether legal enforcement fused with custom, or ultimately prevailed where customary sanctions were deemed insufficient by litigious parties.

discussion consists of hundi legal cases which address the question of why legal enforcement was sought by referring to Richard Crasswell's distinction between 'agreement' and 'background' rules.<sup>176</sup> Finally, I will discuss what implications hundi legal enforcement has for debates on the problem of contract enforcement over long-distance trade with or without legal frameworks.

### 3.1 Agreement and Background Rules

Using the three concepts of honour, reputation and bankruptcy, this analysis scrutinises how normative as well as cultural preferences shaped the function of hundi. While reputation serves to enforce credibility and encapsulated interest<sup>177</sup> or trust, honour, though linked to reputation, carries a substantively normative tenor. The words 'honoured' or 'dishonoured', assumed a functional tenor in transactions, being commonly used to characterize a hundi agreement which had been respectively fulfilled (in the former case) or breached (in the latter). At root, however, honour, was essentially normative, implying a probity and integrity in one's actions leading to the fulfilment of agreements. In what instances could this normative dimension break down?

One way of explaining this is through Crasswell's breakdown of contract rules as 'background' or 'default' rules, alongside 'agreement' rules. Background rules set out the precise substance of each party's obligations, such as the conditions and sanctions governing performance and non-

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<sup>176</sup> Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising," *Michigan Law Review* 88, no. 3 (1989).

<sup>177</sup> As seen in chapter one, Russell Hardin, coins this term to describe the circumstance of "I trust you because I think it is in your interest to attend to my interests in the relevant manner".

performance. Agreement rules define those conditions which are “necessary for a party’s apparent consent to be counted as truly valid.”<sup>178</sup> As Crasswell notes, these categories might also be interchangeable. While Crasswell uses these categories to better illuminate why promises are binding, these categories are a useful way of breaking down the principles governing individual hundi transactions. For instance, they may help us to understand why reputation and honour, which are integral parts of hundi, encourage reliance on contractual agreements.

### 3.2 Fraudulent use of Reputation

Hundi court cases reveal that the parties involved in a hundi transaction were almost always known or reputed persons. Even the *gomashtah* (agent) of a merchant was usually well-known. In an 1837 Privy Council appeal case,<sup>179</sup> remarkably a person, *Kundoo Bucha-jee* had apparently fraudulently conducted transactions with all the authority of the official *gomashtah* of a particular merchant house – the firm of *Chinto Punt*. The alleged *gomashtah* had purchased two hundis in the name of *Chinto Punt* from the merchant *Roop Chund*. He had then endorsed and sold them on in *Chinto Punt*’s name to another merchant *Tapi-das Bhookun-das* – the respondent of the appeal case. When the respondent presented the hundis for payment, they were dishonoured. The respondent in turn sought payment from *Kundoo Bucha-jee* for the amount due and expenses incurred. *Kundoo Bucha-jee* is said to have promised payment, but instead absconded. (See Table 3.1: *Madho Row Chinto Punt Golay v. Bhookun-Das Boolaki-Das*.)

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<sup>178</sup> Craswell, "Contract Law, Default Rules, and the Philosophy of Promising." P. 503.

<sup>179</sup> *Madho Row Chinto Punt Golay, Esuwnt Row Chinto Punt v. Bhookun-Das Boolaki-Das*, J. and H. Clark, Law Booksellers, Portugal Street, Lincoln’s Inn, London(1837).

Even more surprisingly, there is evidence that Kundoo Bucha-jee was so plausible as the gomastah of the house of Chinto Punt, that none of the persons with whom he conducted business, doubted his authenticity as Chinto Punt's agent. In other words, Kundoo Bucha-jee was credible as Chinto Punt's gomastah even though a direct connection with the merchant had not been established.

How did Kundoo Bucha-jee succeed in establishing himself as Chinto Punt's gomastah in the eyes of the other merchants? First, we learn that he was conducting transactions outside the usual remit of Chinto Punt's firm. Thus it would seem quite normal for other merchants to carry out business with Chinto Punt's alleged gomastah, rather than the merchant alone. This circumstance would also have ensured that Kundoo Bucha-jee did not cross paths with Chinto Punt. For the merchants conducting business with Kundoo Bucha-jee, the strength of Chinto Punt's reputation would have underscored any credibility that Kundoo Bucha-jee carried.

If the house of Chinto Punt had established a strong reputation within the merchant world, other merchants would never doubt that his alleged gomastah would dishonour any transactions. The importance of maintaining one's reputation, and code of honour, is also evinced by the efforts taken by Chinto Punt's firm to clear both its liability and name in the courts. While Kundoo Bucha-jee himself apparently cared little for his name and fled -- an action which must be presumed an admission of guilt -- the house of Chinto Punt fought the accusations laid at its door.

Given that the gomastah absconded, a relationship between the appellants and the gomastah needed to be established for the respondent (Bhookundas) to gain reparation for his dishonoured bills. The Privy Council decided

to reverse the two former decrees which had favoured the respondent based on the inconclusiveness of the evidence; it could not be established that that the person acting as gomastah for the appellant's firm was indeed the agent of that firm

In several respects, hundi provides an insight into working relationships between merchants. In his analysis of court cases involving Sindhi merchants in the late nineteenth and early twentieth centuries, Markovits observes the following:

One common characteristic of most of these 'breaches of trust' is that they did not occur between 'equals' but between contracting parties which were in a position of subordination and superordination in relations to one another..<sup>180</sup>

This analysis reinforces the perception of trust as both 'polysemic' and often masking relationships of power, as discussed in chapter one.<sup>181</sup> It suggests that trust needed to be established between parties of equal status or reputation in order for mercantile agreements to be enforced. The case above would seem to exemplify this. There is a sense that the negligent attitude of the absconding Kundoo Bucha-jee was a consequence of his subordinate position to both Chinto Punt and Tapi-das Bhookun-das.

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<sup>180</sup> Markovits, *The Global World of Indian Merchants 1750-1947: Traders of Sind from Bukhara to Panama*.

<sup>181</sup> See chapter one for a reference to polysemic trust by Harriss, "'Widening the Radius of Trust': Ethnographic Explorations of Trust and Indian Business."

**Table 3.1 Madho Row Chinto Punt Golay v. Bhookun-Das Boolaki-Das**

<b>Mechanics of operation and terminology</b>	<b>Person A Who made the order</b>	<b>Person B Who received the order</b>	<b>Person C Who benefited by the order</b>	<b>Person D Who benefited by the order</b>
	The person who draws the instrument, or makes an order, and the person who originally endorsed the instrument	The person who is expected to pay an instrument when it is presented for payment. In other words the person on whom the hundi is drawn	The person to whom the instrument is payable, and who now owns the instrument. This person may sell the instrument or transfer it by endorsing to another	The person to whom the ownership of the instrument is transferred by endorsement, and to whom it is therefore payable
	Endorser Drawer	Drawee Acceptor	Payee Holder Bearer Fresh Endorser Seller Transferor	Endorsee Holder Bearer
	Hundi drawn by A	Upon B	In favour of C	In favour of D
<b>Persons in case</b>	Roop Chund Deo Chund at Baroda	Hurree Curran of Poona	Sold to Bhookun-das in favour of Chinto Punt, sold by Kundoo Bucha-jee in Chinto Punt's name	Tapi-das Bhookun-das becomes new owner of two hundis



The literal definition of dishonour is the loss of honour, and therefore if Kundoo Bucha-jee possessed no reputation or status to begin with, its loss could not have much value. In other words, if we are to view hundi as an institution constraining risk-averse behaviour, according to certain ideals of commercial ethical conduct, then we can understand that one such ideal is honour, of which reputation is a part. Thus hundi transactions were necessarily premised on codes of honour and status. This is all the more apparent if we ask: would the drawer and the eventual beneficiary of the hundis have conducted business with Kundoo Bucha-jee were he not allegedly affiliated with one of the other reputable merchant houses? It seems very unlikely.

So, what was the exact substance of Kundoo Bucha-jee's obligation to the parties with which he conducted hundi transactions? The hundi in this case, provided a promissory assurance to the parties, who were eventually subject to fraud, that payment would be made. This in essence was a core background rule, governing performance. The agreement rule consisted of hundi being issued with the full consent of a valid and reputable party. Reputation, which provided the foundation of the various parties' reliance, essentially formed the corpus of the agreement rule. Thus when the agreement rule was breached, here through fraud, the background rules were not enforceable. In this case, one party—Chinto Punt—had not really consented to the transaction, therefore there were no valid agreement rules, and the background rules were moot.

### 3.3 Collateral Security and Protection Mechanisms within Hundi

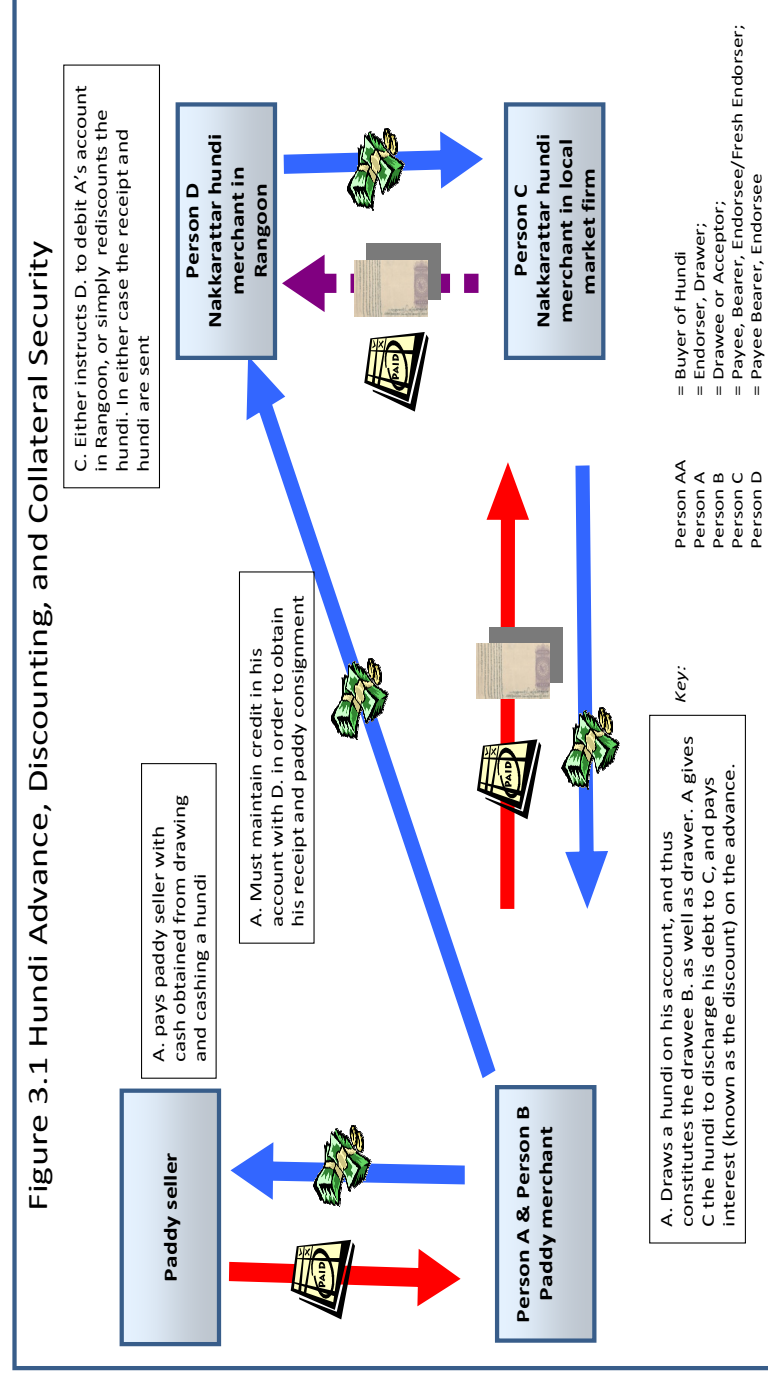
On the question of reputation, we can agree with Rudner's statement that "the drawing of *hundis* was quite a flexible matter and hinged on the specific situation of drawer and drawee."<sup>182</sup> As mentioned previously, it was common practice for the person issuing the hundi to apply a rate of interest relevant to the status of the person to whom it was payable. When hundi merchants dealt with merchants who were not part of the community, but who held accounts with them, it was customary to retain shipping receipts of goods for hundis cashed. This convention served as a measure of collateral security.

Rudner describes one such typical scenario in which a paddy merchant buys a shipment of paddy at a local market in Burma with cash obtained by drawing a hundi on his account at a local Nakarattar banking office. The Nakarattar merchant would have cashed the hundi, taken custody of the railroad receipt for the paddy shipment and received a discounting fee of a given amount. Then the hundi, railroad receipt, along with instructions to debit the paddy merchant's account, would have been sent to the firm's main office in Rangoon. Alternatively, if the Nakarattar merchant had no office in Rangoon, he could send the hundi and receipt to another Nakarattar merchant, and thereby rediscount the hundi with the second Nakarattar merchant. In this way the paddy merchant is able to pay cash without actually carrying it, by obtaining an advance on his Nakarattar account. In order to retrieve his receipt, he needed to maintain his account with the Rangoon merchant in a satisfactory way. (See figure 3.1)

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<sup>182</sup> Rudner, *Caste and Capitalism in Colonial India: The Nattukottai Chettiars*. P. 94.

Figure 3.1 Hundi Advance Discounting and Collateral Security



Om Prakash describes the discount rate at the point of issue, or rediscount, as a factor of distance and the volume of hundi transactions between points of transactions.<sup>183</sup> While Prakash's account relates to the Mughal period, a glance forward to 21<sup>st</sup> century accounts of hundi transactions confirms this as a guiding principle in hundi transactions over the centuries. In his study of hundiwallahs<sup>184</sup> in Kabul, Maimbo points out that the cost of transactions is also dependent on the delivery location and the competitiveness of hundiwallahs within a given location. Differential modes of transaction may be offered, as in the case of NGOs and international aid organisations using hundi to receive funds in Kabul from foreign locations such as Washington D.C. Such customers utilize a more rigid confirmation process, particularly given concerns about counterfeit cash.<sup>185</sup> In these instances, the absence of a competent formal banking sector in Afghanistan has made the use of hundis virtually indispensable, and thus the volume of hundi traffic all the greater.

Hundis themselves were often retained as collateral security by parties involved within disputes. It could retain its validity even after the period for presentment had elapsed if the hundi had been dishonoured. In November 1859, a hundi which formed the basis of another hundi transaction, was sued upon in the *Sudder Udalt*<sup>186</sup> court in Madras.<sup>187</sup> On the 15<sup>th</sup> June 1857, the

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<sup>183</sup> Prakash Om, 'System of Credit in Mughal India', p. 50 IN Bagchi, *Money and credit in Indian history from early medieval times*.

<sup>184</sup> A term denoting hundi dealers, also known as hawaladars.

<sup>185</sup> Mohammed El Qorchi, Samuel M. Maimbo, and John F. Wilson, *Informal Funds Transfer Systems: An Analysis of the Informal Hawala System*, IMF/WorldBank (Washington D.C.2003).

<sup>186</sup> *Sudder Udalt* courts were the chief courts of appeal present in the Calcutta, Madras and Bombay Presidencies. Though presided over by Europeans, these courts administering civil court judgements based on Hindu and Islamic law for native Indians only. The Supreme Courts in contrast, chiefly dispensed English and civil law. In 1862 the *Sudder Udalt* courts were however, merged with Supreme Courts to form the High Courts and were then used by Indians and Europeans alike.

first defendant drew a hundi for 300 Rupees on the person described as the fourth defendant in favour of Namburi Subbarayadu. The hundi was payable at eighteen days' sight and was accepted by the fourth defendant on presentation. On the 31<sup>st</sup> July 1857, the fourth defendant issued another hundi in order to make provisions for the first hundi. This second hundi was drawn on an M. Guramurti for 700 Rupees. However, Subbarayadu found the latter hundi dishonoured on presentation. The first hundi was retained by Subbarayadu and then later transferred to the plaintiff who initiated the suit for recovery of the hundi's value. The court found in favour of Subbarayadu because the first hundi had not been relinquished. This hundi which had been accepted by the defendant could therefore serve as collateral security in the event that the hundi drawn on Guramurti was dishonoured.

In this instance, the collateral security provided by the hundi itself provided a key rule of agreement. In the event of non-performance the hundi itself served as a means of underscoring the integrity of the original agreement. Why was this particular agreement rule exerted in this instance? As mentioned previously, this was a direct marker of the kind of relationship between the parties. Hundi as collateral, signifies that a level of coercion in addition to encapsulated interest—which we can construe as the background rules—were required for enforcement and agreement rules to be effective.

But what part did honour, or, an intact reputation, and thus, the normative play in this transaction? Quite clearly, honour alone was insufficient as a means of enforcing multilateral hundi transactions. While honour alone

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<sup>187</sup> *Ruling no. 114 of 1859*, Rulings of the Court of Sudder Udalut, Contained in the Decisions Passed by them during the Years 1858 to 1862, compiled by S.Vejia Ragavooloo Chetty, Madras: Graves, Cookson and Co.(1865).

might have played a role in the functional relationship between the first and the fourth defendant, it seems to have been lacking in the connection between the fourth defendant and Guramurti. We might wonder why Guramurti did not honour the fourth defendant's hundi, but this lies outside the remit of the information available on the case. However, we can conclude that the breach in agreement rules between the fourth defendant and Guramurti, was only adequately compensated for through coercion built into the background rules. If encapsulated interest<sup>188</sup> alone were the determining feature of hundi transactions, or indeed the main corpus of agreement rules, then any change in encapsulated interest would affect the agreement rules themselves.

### 3.4 Jadowji Gopal v. Jetha Shamji (1879)

The purchase of insurance or risk protection through a jokhmi hundi epitomised a form of encapsulated interest. This was not to be confused with an English bill of lading; the latter offered a receipt and contract of carriage of goods, and was potentially a negotiable instrument granting the bearer the right to delivery. A jokhmi hundi, on the other hand, served to minimise the risk of cargo loss. A merchant or consignee might purchase a jokhmi hundi from the consigner against the shipment of his goods. The consigner would draw this jokhmi hundi on the consignee, and then negotiate the hundi to a broker or insurer. By discounting the hundi with the insurer, the consignee or drawer would get the sale price of the hundi, less commission charges of the insurer before the hundi's maturity date. If the shipment arrived safely in port, and the consignment was delivered, the jokhmi hundi

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<sup>188</sup> Russell Hardin's definition of encapsulated interest: "'I trust you because I think it is in your interest to attend to my interests in the relevant manner.'" See chapter one for more details.

would be payable by the consignee or drawee, functioning like a bill of exchange.

If the ship were lost, the bearer could present the jokhmi hundi and be entitled to its value. The broker would incur the loss of the funds owing on the hundi. In this way, protection was afforded to both the drawer and the drawee, serving as a policy of marine insurance.

In this 1879 civil court case, the plaintiffs, being the firm of Jadowji Gopal, launched a suit against the Official Assignee (second defendants) of an insolvent firm called Liladhar Govindji (henceforth known as *L*). They also launched the same suit against the owners of the ship which had carried their goods, the firm Dayal Morarji (first defendants). The plaintiffs wished to recover either their consignment, or the funds owing on a jokhmi hundi. Having purchased a jokhmi hundi from the firm of *L* on 22<sup>nd</sup> December 1878 for Rs. 4,000., the firm of *L* drew a jokhmi hundi in favour of the plaintiffs upon his firm in Bombay. Written on the hundi was a statement that it was “drawn against” twenty-nine bales of wool shipped at Tuna, and made payable eight days after the ship had safely docked at Bombay. Simultaneously, *L* gave the plaintiffs a letter addressed by him to his firm at Bombay which read as follows:

Upon you a jokhmi hundi is drawn, the particulars whereof are as follows:-

(Rs. 4,000). The value having been received from Jadowji Gopalji, hundis for Rs. 4,000 drawn against 29 bags of sheep’s wool shipped on board the ‘Hariprasad,’ owner Dayal Morarji from the seaport town of Tuna... On the safe arrival of the vessel do you be good enough to land the goods, and deliver the same to Jadowji Gopalji; and as to the jokhmi hundis drawn before, if in respect thereof any money has to be paid to Jadowji Gopalji, do you be good enough to pay the same.<sup>189</sup>

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<sup>189</sup> *Jadowji Gopal v. Jetha Shamji*, Digest of Indian Law Cases Containing High Court Reports, 1862-1909, and Privy Council Reports of Appeals from India, 1836-1909, Vol. II. Case cited from I.L.R. 4 Bom. 333; *Jadowji Gopal &c. v. Jetha Shamji*, 4 Indian Law Reports(1879)..

On 27<sup>th</sup> December 1878, the plaintiffs presented the letter to *L*'s firm in Bombay. On the 1<sup>st</sup> January 1879, the firm of *L* was declared insolvent by the High Court at Bombay. The ship 'Gunga Hariprasad' containing Jadowji Gopal's consignment of wool bales arrived at Bombay on the 5<sup>th</sup> January 1879. However, the ship owners, Dayal Morarji, delivered the goods on the 7<sup>th</sup> January to the Official Assignee of *L*'s estate and effects rather than to the plaintiffs. Dayal Morarji informed the plaintiff's solicitors that the Official Assignee had requested they deliver the consignment to him. As the Official Assignee had agreed to indemnify the shipowners from the consequences of this delivery, they had thought it advisable to comply with his request.

Drawing on the custom of jokhmi hundis, the plaintiff claimed that when the ship had arrived safely, he was entitled to either the amount of the jokhmi hundi by the drawee, or to take possession of the consignment of wool bales. (See figure 3.2) On the other hand, the Official Assignee rejected the plaintiffs' claim to any charge or lien upon the consignment of wool. He contended that at the date of the insolvency, the wool was the property of *L*, or at his disposal, and as such were assets vested in the Official Assignee.

The Official Assignee was essentially staking his claim with respect to the laws of insolvency without discrimination. According to such laws, the Official Assignee was legally appointed to take charge of the property of the insolvent debtor, and distribute its value equally amongst its creditors.

As a result, the court considered several questions. First, were the plaintiffs entitled to a lien or charge on the wool? Second, were the bales of wool truly at the disposal of *L* as per the true interpretation of the Indian Insolvent Act? And third, what implications did the charge created by the hundi have for



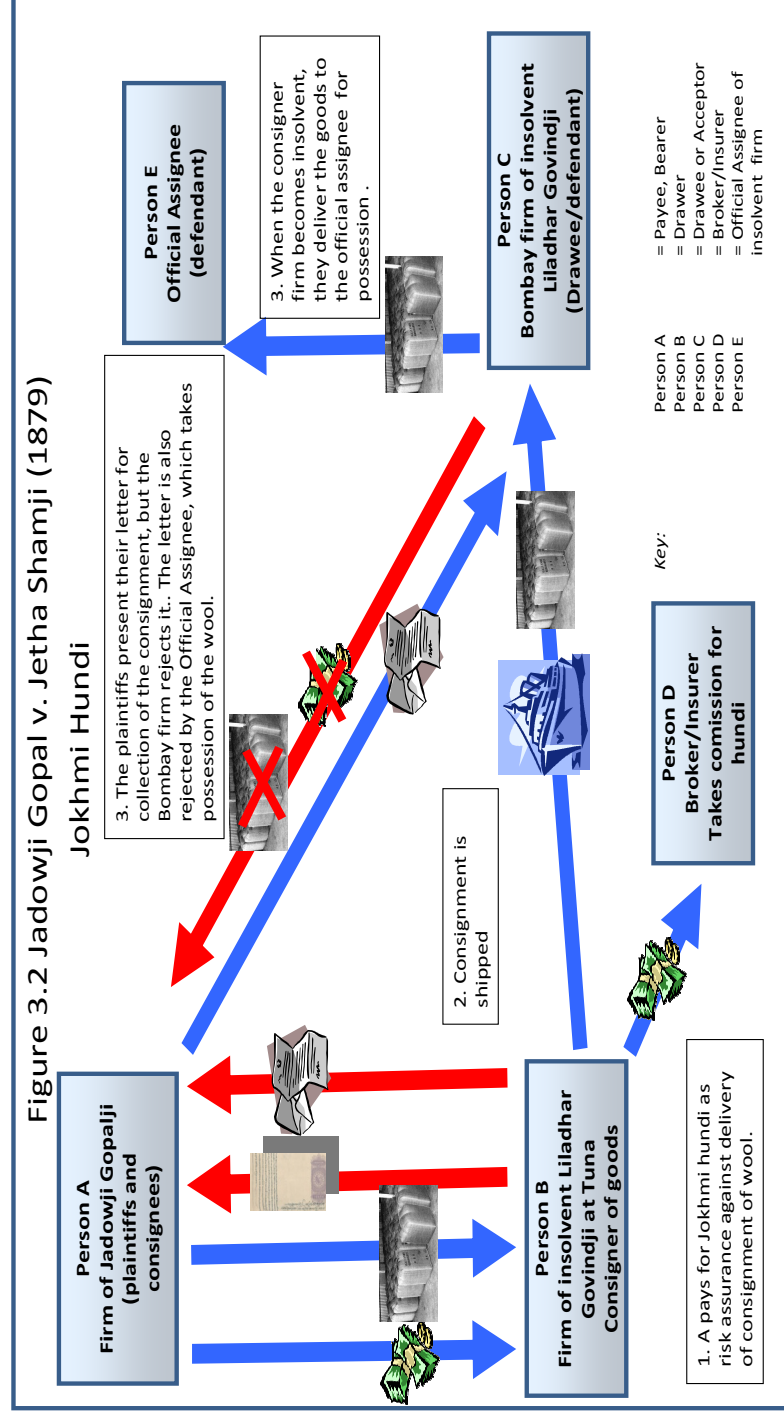
the body of *L*'s creditors at large? Did it constitute fraud against such creditors, and was it therefore void?

The prosecution made reference to the authenticity and established custom of jokhmi hundis, which proffered a specific lien or charge on the holder of these instruments. By this same custom, if the drawer of a jokhmi hundi became insolvent, the bearer of the hundi would expect to have his claim satisfied out of the proceeds of the sale of the goods. A second argument was made with respect to the letter that had been written by *L*, and given to the plaintiffs to instruct his firm in Bombay. They argued that this must operate as a valid equitable assignment of goods as security.

The defence had argued that the plaintiffs had not fulfilled all the criteria necessary to prove their ownership of the consignment. In order to ensure delivery, the plaintiffs should have had their names inserted in the *satmi* (ship's manifest) as consignees, thereby giving notice to the shipowner of their claim. No notice had been given to the shipowner until after the insolvency of *L*. However, the plaintiffs claimed that it was not possible to give notice of this charge over the goods to the master of the 'Hariprasad' ship, because the vessel had already departed by the time they got the hundi.

At any rate, the court decided that the plaintiffs right to the goods could not be ascertained through the jokhmi hundi, because such a hundi was taken on the credit of the drawer, *L*. Since *L* became insolvent, the Official Assignee had a legal right to the goods.

Figure 3.2 Jadowji Gopal v. Jetha Shamji (1879)



Nevertheless, the court assessed that the letter written by *L*, and presented by the plaintiffs, though not a legal assignment must be considered an equitable assignment. *L* had clearly assigned ownership of the goods and monies owed to the plaintiffs in the letter, therefore the ownership of the plaintiffs must be valid, and it was in the interests of fairness and justice (equitability) for the courts to enforce this assignment of rights.

The custom of jokhmi hundi conflicted with the rights of the Official Assignee in the event of insolvency. Primacy of rights was accorded to the Official Assignee in the case of insolvency because the validity of the jokhmi hundi rested on the credit of the drawer. If the drawer became insolvent, then the jokhmi could not recompense. It is additionally clear that insolvency laws were better recognised by the courts than the established custom of jokhmi hundis. The court read that jokhmi hundis could open the door to misuse and fraud, but it saw the letter as a marker of authenticity. On that basis it was able to uphold the plaintiffs claim on the consignment.

### **3.5 Decision of the Court**

What does this case reveal about agreement rules and background rules? The court did not recognize the validity of the substance governing each party's obligations through the jokhmi hundi, once the original drawer of the hundi became insolvent. In other words, the court gave greater importance to the conditions and sanctions governing performance of the Official Assignee. In doing so, it accorded more weight to the rights of creditors of an insolvent estate. Therefore, the court placed greater emphasis on the background rules governing insolvency than those directing jokhmi hundis. As a consequence, the agreement rules of a jokhmi hundi were rendered weak and inconsequential. Nevertheless, the letter written by *L*

was able to assign better background and agreement rules because of the principle of equity.

It is perhaps for this reason that the courts also recognized another form of protection that was built into hundi transactions, namely, the instruction sent from the drawer of a hundi to the drawee, and the drawee's communication of acceptance. In virtually all hundi transactions the drawer would instruct the drawee to pay a given amount to a particular person on presentation. For the drawee this legitimized any claims subsequently made. Without this instruction, the drawee was under no obligation to pay, and indeed this system provided the means of safeguarding the drawer's credit. Similarly, once a hundi had been presented to the drawee, and the drawee had communicated his acceptance, payment was obligatory. Any subsequent refusal to pay, amounted to the hundi being classed as 'dishonoured'.

### **3.6 Thiravium Pillai Madaswami Pillai v. Rama Subbansivathanu Chettiar (1918)**

In the event of hundi being dishonoured, it was also necessary for notice of dishonour to be given. In this Travancore civil court case, the original plaintiff or appellant Thiravium Pillai Madaswami Pillai (henceforth known as Pillai) was owed money by two persons: Bhagvathiperumal and Thenkarai Muthu. In order to discharge this debt, Bhagvathiperumal paid the defendant, a hundi merchant called Rama Subbansivathanu Chettiar, Rs 168<sup>1/2</sup> and procured a hundi instructing another hundi merchant, Ramasubba Aiyar in Tinnevely District to pay the amount of the hundi to the plaintiff.

After receiving the hundi, Pillai endorsed it to his banker Nanu Aiyar. Nanu Aiyar duly presented the hundi to the drawee Ramasubba Aiyar only to find

it dishonoured. The plaintiff initially sued Bhagvathiperumal but then withdrew his claim and subsequently purchased Bhagvathiperumal's claim in relation to the dishonoured hundi, against the defendant Rama Subbansivathanu Chettiar in this suit. (See Figure 3.3 and Table 3.2.)

The lower courts found favour with the defendant's plea that no notice of dishonour was given, as per the provisions of the Negotiable Instruments Regulation (NIA) II of 1900<sup>190</sup>. These provisions stipulated the necessity for notice of dishonour, and discharged any party to whom it should have been given, from all liability unless section 100 of the NIA was proved applicable.

The lower courts in the first appeal case and original suit respectively, held that the burden of proving any exceptions to NIA provisions must rest squarely with the plaintiff. In this second appeal, the appellant argued that the lower courts had been wrong to apply the provisions of the NIA to this suit. Even if they were found to be applicable, the appellant first argued that the defendant could not, and did not suffer damage in the circumstances through a lack of notice. Second, the neglect of notice did not discharge the drawer (Chettiyar/the defendant) from liability on the consideration for which the bill was made, namely the debt by Bhagavathiperumal to Pillai. It would seem that in purchasing Bhagavathiperumal's claim to the dishonoured hundi, Pillai regarded Chettiyar as responsible for discharging the debt to him.

On the second matter, the question for the courts was whether neglect of notice of dishonour, where a bill was taken as conditional payment, also

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<sup>190</sup> Malayalam year 1075. The corresponding Gregorian calendar year is calculated by adding the value 825 to the given Malayalam year.

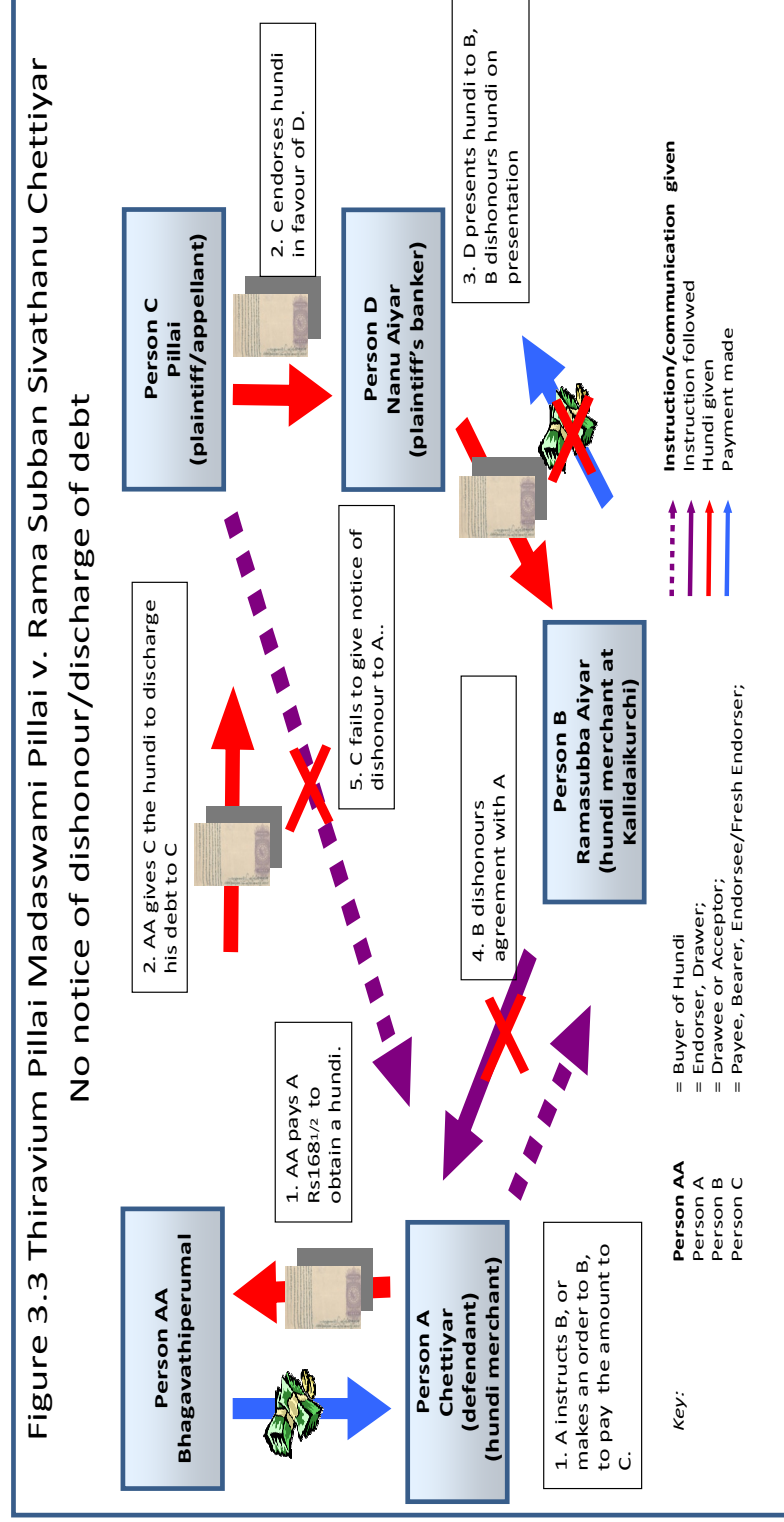
effected a discharge of the original debt. Using the English cases of *Bridges v. Berry*<sup>191</sup> and *Peacock v. Parsell*<sup>192</sup> as precedent, the court asserted that neglect of notice of dishonour would also discharge the original debt upon which the (hundi) bill had been taken as conditional payment. In both of these cases, the courts had established that the absence of notice of dishonour had caused the party who had not been given notice, to suffer losses.

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<sup>191</sup> 3 Taunt 130 = 12 R R 618 = 128 Eng Rep 51.

<sup>192</sup> (1863) 32 L J C P 266 = Eng Rep 630.

Figure 3.3 Thiravium Pillai Madaswami Pillai v. Rama Subban Sivathanu Chettiyar: No Notice of Dishonour/Discharge of Debt.



**Table 3.2 Thiravium Pillai Madaswami Pillai v. Rama Subban Sivathanu Chettiyar**

<b>Mechanics of operation</b>	<b>Person A Who made the order Drawer</b>	<b>Person B Who received the order Drawee</b>	<b>Person C Who benefited by the order Payee</b>	<b>Person D Who benefited by the order Endorsee</b>
<b>Persons in case</b>	Rama Subban Sivathanu Chettiyar (Defendant/ Respondent)	Ramasubba Aiyar (hundi merchant at Kallidaikurchi	Thiravium Pillai Madaswami Pillai (Plaintiff/ Appellant)	Nanu Aiyar (Plaintiff's banker)

In *Bridges v. Berry*, when the holder of the dishonoured bill failed to give notice to the defendant or drawer within the allotted time, the defendant suffered damage. Had the defendant/drawer been given notice in a timely way, he might have immediately withdrawn the effects lodged with the drawee for payment of the bill. In the example of *Peacock v. Parsell* when the holder of the bill in question had presented and found it dishonoured, the holder did not provide notice within the proper time, and the acceptor subsequently became bankrupt. A dramatic change in circumstances such as this would mean that the acceptor could no longer honour the bill.

In the court's determination, it argued that the holder of a bill must be understood to be the holder of money, whether or not the bill had been accepted. In other words, once the plaintiff had taken the bill, he assumed all the rights and duties of holder. Thus, giving notice within the proper time was a responsibility that could not be overlooked given that the circumstances of the acceptor/drawer might easily change.



As regards the first matter—whether or not the defendant suffered damages for want of timely notice of dishonour—the second appeal court requested the submission of further evidence from both parties. On receipt of this evidence, several weeks later, the court established the following facts:

- (i) Even on the date of maturity of the instrument, the defendant Chettiyar had substantial funds in his account with the drawee, Ramasubba Aiyar, of the Kallidakurichi firm.
- (ii) The day after the hundi had been dishonoured, on the 17<sup>th</sup> of the month, the defendant received word that another hundi issued by him had been dishonoured by the drawee.
- (iii) The defendant nevertheless paid for the hundi issued on him by the Kallidaikurichi firm on the 17<sup>th</sup> and the 19<sup>th</sup>.
- (iv) The defendant definitely had knowledge that the Kallidaikurichi firm had become insolvent on the 21<sup>st</sup>.

The court ascertained that the defendant Ramasubba Aiyar was imprudent in continuing to place his trust in the Kallidaikurichi firm, and the plaintiff could not be held responsible. Irrespective, the court concluded that the onus still resided with the plaintiff to establish that the drawee could not suffer damage for want of dishonour. Since the law inferred an injury from lack of due notice, and the presumption was so strong, the provision of proof was essential to dismiss the presumption. While the hundi still had currency, the defendant or drawer of the hundi had funds with the drawee's firm. Therefore, the drawee was under an obligation to pay the bill. On this basis, the court judged that a dispensation of notice to the drawer could not be justified. Accordingly, it ruled in favour of the defendant and dismissed the second appeal with costs.

The fundamental dispute between the appellant and the defendant occurred because the agreement and the background rules came into contention. In this case, the notice of dishonour constituted part of the substance of the payee's obligation to the drawer. As such it can be construed as one of the background rules governing performance and non-performance. The contractual obligation to honour the hundi between the various parties, represents one aspect of the agreement rules of the hundi contract. The drawee/plaintiff purchased Bhagavathiperumal's claim to the hundi which then shifted the rules of agreement to fresh parties. At this point the hundi's validity rested on the agreement between the plaintiff and the defendant. Nevertheless, this did not transfer the original agreement to discharge the debt from Bhagavathiperumal to the defendant. The court isolated this from the contractual obligation of performance inherent in the hundi. It recognized that the hundi contract forged a fresh agreement between the plaintiff and the defendant but prioritised adherence to the conditions governing performance (the background rules) and non-performance. In its evaluation the court construed the risk of damage arising from non-observance of background rules as greater than that of the agreement rules. It is to be assumed that customary sanctions in this case could not suffice because they potentially lacked enforceability of background rules. Alternatively, customary rules could not adequately determine the primacy of background versus agreement rules.

### **3.7 Pragdas Thakurdas v. Dowlatram Nanuram (1886)**

In the case of *Pragdas Thakurdas v. Dowlatram Nanuram*,<sup>193</sup> the claims revolved around two separate business dealings which were linked because

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<sup>193</sup> *Pragdas Thakurdas v. Dowlatram Nanuram*, 11 Indian Law Reporter (Bom) 257(1886).

of the parties involved. One claim centred on collection of a debt, the other claim revolved around two dishonoured hundis.

The plaintiffs, being the firm of Pragdas Thakurdas, had initiated a suit to claim funds due on a debt by the insolvent firm of Fatechand Kanayalal and Kanayalal Jugalkissan. The insolvents operated business at Delhi and elsewhere, while the plaintiffs had business at Bombay, Calcutta and Cawnpore. After discovering that payment to their firm from the insolvents had ceased on March 3, 1884, the plaintiffs sent their Bombay *munim* (agent) Kapurchand to Delhi to investigate. At this point, the insolvents owed Rs. 11,101-2-0 to the plaintiffs. (See figure 3.4)

On reaching Delhi, Kapurchand found that the defendant Dowlatram Nanuram, who had at least two businesses in Delhi, had had taken over the assets of the insolvent Delhi firm. The defendant agreed to pay each of the insolvent firms' creditors a composition of their debts amounting to half the amount owed. In other words, the defendant promised to pay a sum equal in amount to one half of the insolvent firm's debts. Upon receipt of such payment, the creditors were to fully discharge the insolvents' debts.

Kapurchand entered into an oral agreement with the defendant to accept the terms of the discharge. Consequently, letters were exchanged between the defendant's *munim* (agent) and Kapurchand; the defendant's letter laid out the terms of discharging the debt, and the plaintiff's letter agreed to accept such terms, and was signed accordingly. The defendant wrote the amount due in hundis and cash on the foot of the plaintiffs' Calcutta and Cawnpore accounts. Even though both parties were in Delhi at the time of writing the agreement, crucially both parties addressed their letters to each other at their

formal places of business (Bombay and Delhi), and as if they were writing the letters from their respective places of business.

The plaintiffs held other accounts with the defendants, so the court regarded it as entirely consistent that the defendant had agreed to remit the funds to Bombay as soon as they received a detailed statement of accounts from the plaintiffs. Soon afterwards, Kapurchand returned to Bombay.

Figure 3.4 Pragdas Thakurdas v. Dowlatram Nanuram Defendant's Agreement to Pay Insolvent's Debt

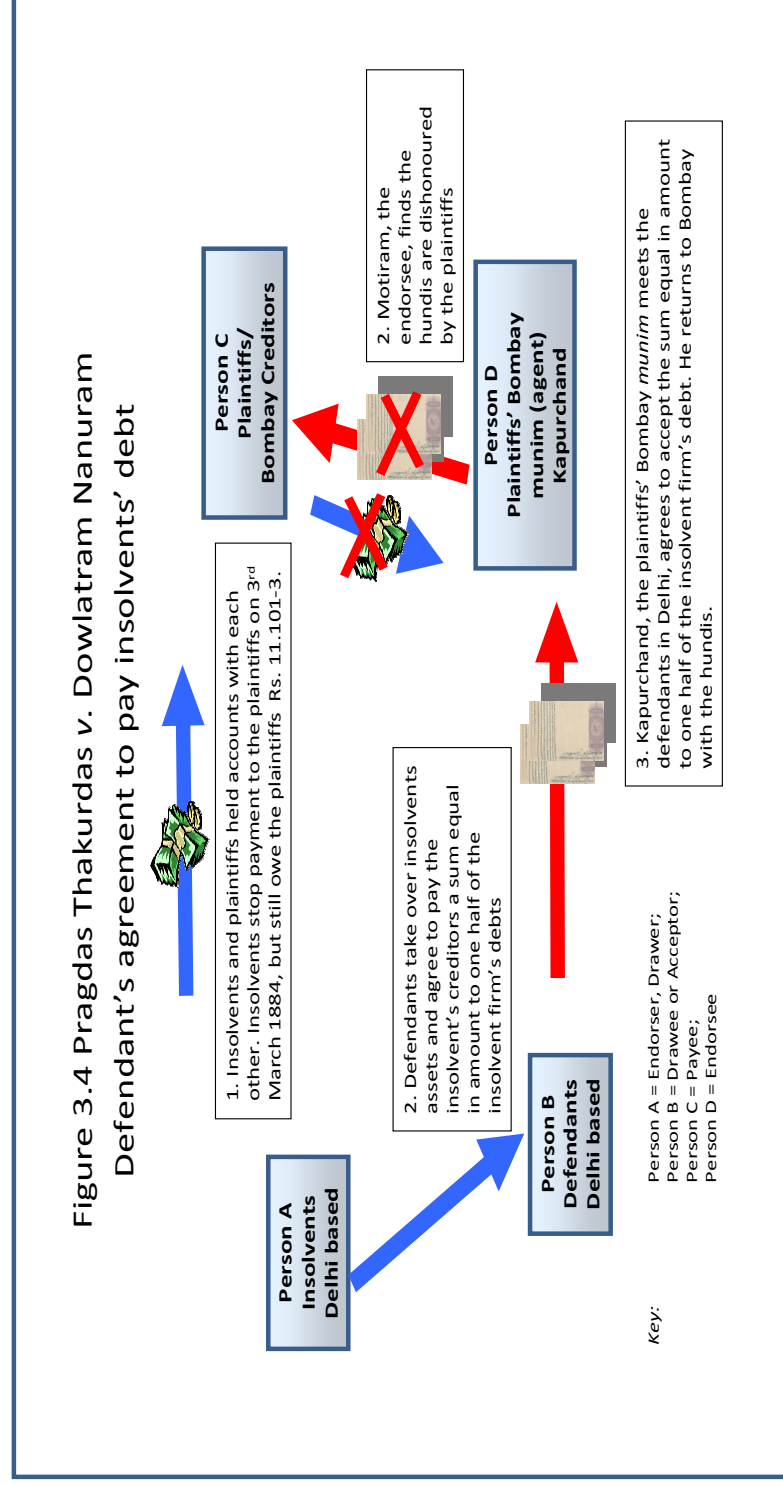


Figure 3.5 Pragdas Thakurdas v. Dowlatram Nanuram: The Insolvents Draw Two Hundis on the Plaintiffs in Favour of the Defendants

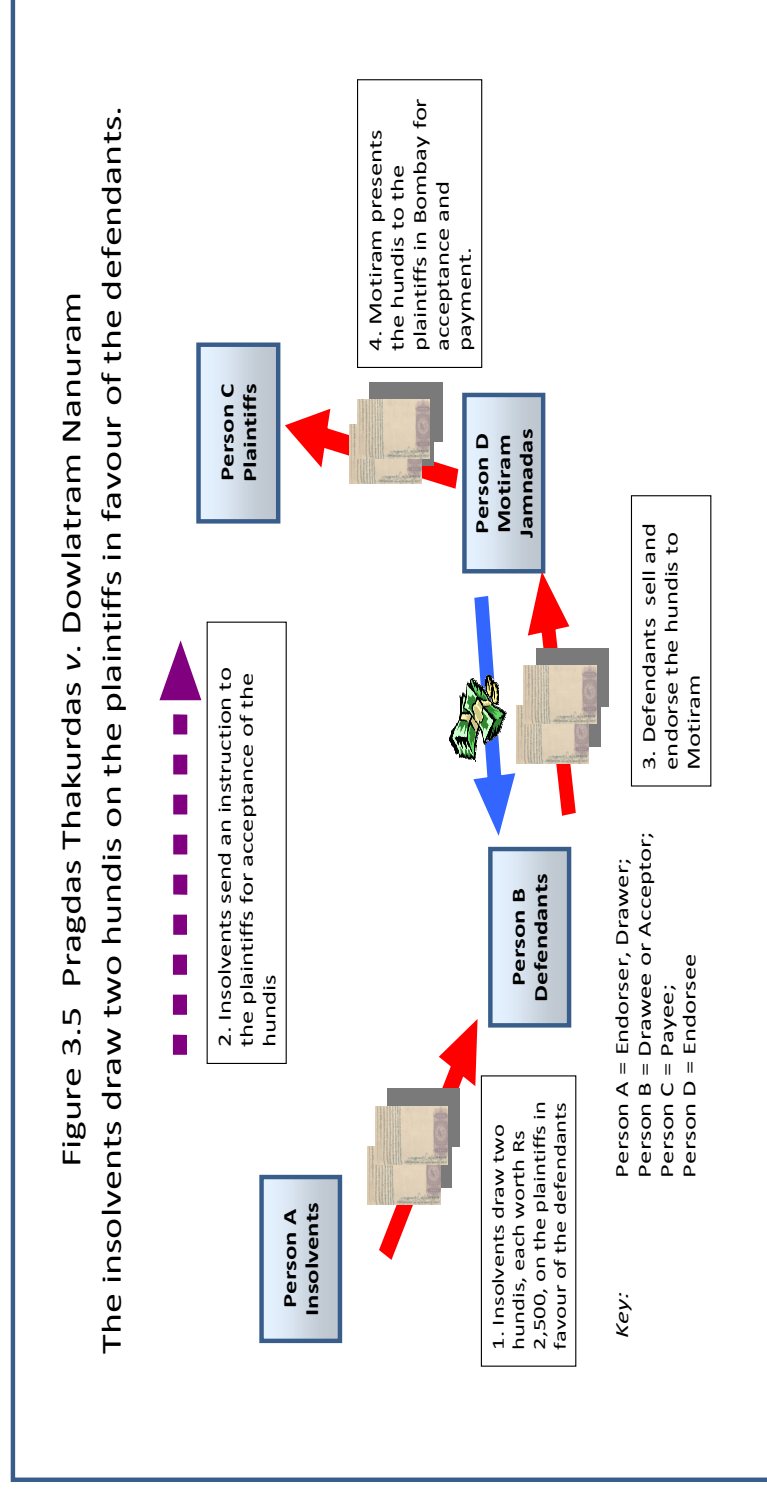
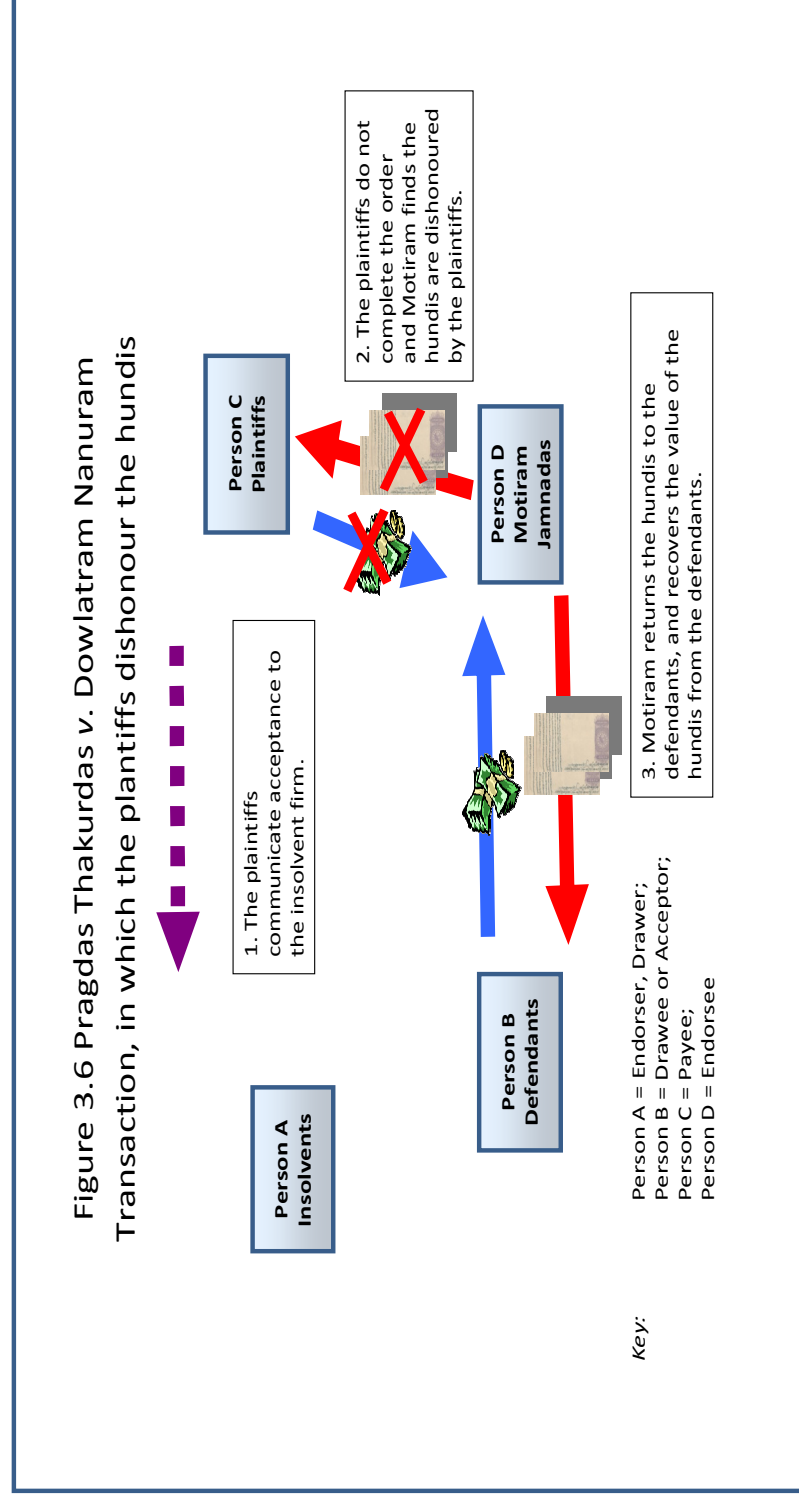


Figure 3.6 Pragdas Thakurdas v. Dowlatram Nanuram: Transaction, in which the Plaintiffs Dishonour the Hundis



Subsequently, the plaintiffs brought a civil suit against the defendant at the Bombay High Court to claim for the sum of Rs 5,550-9-0, this being the sum representing half the amount owed by the insolvents. The defendant in turn denied the jurisdiction of the Court, arguing that the alleged cause of action – the composition-deed—was at Delhi. He further alleged that the plaintiffs had not provided the defendant with any accounts of the dealings between them and the insolvents. The court inferred that the defendant fully intended to remit the funds to the plaintiffs in Bombay had it not been for another matter (see next paragraph) concerning dishonoured hundis. Consistent with this idea, the defendant had also claimed that if the plaintiffs suit was held to be maintainable in the Bombay Court, that the amount claimed by the plaintiffs should be off-set by an amount owed to the defendant by the plaintiffs through two dishonoured hundis.

In determining the facts of that case, the court found that the insolvents had drawn two hundis, valued at Rs 2,500 each, on the plaintiffs, with the defendant as beneficiary. The defendant in turn sold and endorsed the hundis to a Motiram Jamnadas. Motiram sent the hundis to the plaintiffs' Bombay firm, for realization on the due date. The plaintiff's Bombay firm also happened to be the agent of Motiram. On 28<sup>th</sup> October 1884, the plaintiffs received the hundis, and on the 30<sup>th</sup> October, 1884, the plaintiffs wrote to the insolvents (the drawers of the hundis) communicating their acceptance as follows:

Further hundis for Rs. 5,000, drawn by the people of the piece-goods shop<sup>194</sup>, were received as payable. The same are accepted. (See figure 3.5.)

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<sup>194</sup> The insolvent firm at Delhi were the piece-goods shop.



Despite this communication of acceptance to the drawer, the plaintiffs subsequently dishonoured the hundis notifying their non-acceptance to Motiram on the 3<sup>rd</sup> November, 1884. Motiram returned the hundis to the defendant, and recovered his money. The defendant in turn sought to offset the amount paid for the hundis against the claim of the plaintiffs towards the debt owed by the insolvents. However, the plaintiffs stated that there was no proof the hundis had been accepted by them because they had not communicated acceptance of the hundis to Motiram, and they therefore argued that they were not bound to accept the hundis. (See Figure 3.6 )

English legal precedent had determined that the liability of an acceptor to a bill of exchange attached, not by a person simply writing their name on it, but rather on the subsequent delivery of the bill, or according to directions given by the person entitled to the bill, that it had been accepted. This precedent laid out that a drawee's (or acceptor's) communication of acceptance to the holder, would bind the drawee to honour a bill. The question of whether communication of acceptance by the drawee to the drawer was binding had not arisen in English law, and ultimately presented the pivotal focus of the plaintiff's claim to legitimately dishonour the hundis. However, the Court determined that there was no reason why a communication of acceptance to the drawer or previous holder, would not bind the drawee just as much as communication of acceptance to the current holder. It was felt that the primary contract was between the drawer and the drawee in any event, thus the drawee's acceptance must serve to benefit both the drawer (previous holder) as well as the current holder.

**Table 3.3   Pragdas Thakurdas v. Dowlatram Nanuram**

<b>Mechanics of operation</b>	<b>Person A Who made the order Drawer</b>	<b>Person B Who received the order Drawee</b>	<b>Person C Who benefited by the order Payee</b>	<b>Person D Who benefited by the order Endorsee</b>
<b>Persons in case</b>	Insolvent firm Fatechand Kanaylal and Kanaylal Jugalkissan	Plaintiffs Pragdas Thakurdas and others	Defendant Dowlatram Nanuram	Motiram Jamnadas.

Did the plaintiffs, in their capacity as drawee, actually accept the hundis?, asked the court. The hundis came to the plaintiffs for acceptance on 28<sup>th</sup> October 1884, and to the Court's thinking the plaintiff's communication of acceptance of the hundis to the drawer on 30<sup>th</sup> October 1884, was clear and unequivocal. Moreover, the plaintiffs had not notified Motiram of the hundis non-acceptance even by the 3<sup>rd</sup> November. This was regarded as an unreasonable amount of time to have held the hundis "*in dubio*" (in doubt). Presumably, the court's decision was based on the length of time that was customary for merchants to issue acceptances or non-acceptances. The court held that the hundis should have been honoured by the plaintiffs, and that the defendants were entitled to offset the value of the dishonoured hundis plus costs from the amount owed to the plaintiffs on the insolvent's debt.

### 3.8 Reputation and Insolvency

Encapsulated interest could and did change over the lifetime of a given hundi transaction, largely because welfare outcomes were altered by exogenous elements. One such significant element was, as we have seen in the previous case, bankruptcy. If a firm was known to be insolvent, then there was a strong likelihood that other firms would not honour any hundis drawn by the insolvent firm. Reputation was a requisite quality enabling one firm to draw hundis on another. Why for instance, in the above case, did the plaintiffs chose to dishonour the hundis drawn by the insolvent firm after already providing written acceptance of the order? We can speculate that on learning of the drawing firm's insolvency, the plaintiff's firm no longer felt it was worthwhile to honour the original agreement. If sufficient drawer's funds were not already held by the plaintiff's firm, the latter might have subsequently expected to lose funds on the transaction.

Om Prakash notes that while the hundi system worked "remarkably efficiently"<sup>195</sup> during the Mughal period, there was also a degree of risk involved with the *sarraf*<sup>196</sup> – on whom the hundi was drawn, or from whom the hundi was bought – going bust. Therefore, the risk of insolvency was not limited to the drawer alone. Thus, in most instances, reputation was essentially a rational calculative quality. Insolvency adversely affected this kind of reputation, and could breach the original contract between the drawer and acceptor.

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<sup>195</sup> Prakash Om, 'System of Credit in Mughal India', p. 49 IN Bagchi, *Money and credit in Indian history from early medieval times*.

<sup>196</sup> Prakash defines the *sarraf* as professional dealer in money. See p. 40 of the previous reference. However, the term, alongside its linguistically corrupted version *shroff*, merely denotes a banker.

Bankruptcy was an endogenous and exogenous force that negatively impacted on reputation, and thus enforcement, as well as rupturing the normative quality of honour. The endogenous quality was simply a state bereft of credit, but economic rationalizations fail to sufficiently account for the exogenous dimension because it was cultural. To understand the cultural enormity of bankruptcy, Safley provides an excellent account of the scandal attached to the phenomenon in early modern Europe. The downfall of a prominent German merchant house emits a particular cultural signal, which interestingly is based on normative principles. Safley shows that during this period, "bankruptcies signalled ethical decay and economic decline to officials, investors, and creditors alike."<sup>197</sup> Bankruptcy in this account was scandalous because it could, and usually did damage the reputations of those connected to the bankrupt. What created this scandalous face of bankruptcy was the sense that choices made by individuals on the eventual path to insolvency and indebtedness, were inevitably unethical.

This kind of theme on the immorality of unfortunate choices, misappropriated funds and indebtedness pervades the novels of Charles Dickens, notably *Little Dorrit*. The debtors' prison is a prominent device providing the sense of 'moral atonement. This is in contrast to the moral impunity of fleeing one's creditors, or even committing suicide, thus relegating sole responsibility for the consequences of their actions to their families. Overwhelmingly, the die that has been cast in the run up to bankruptcy is portrayed as a decision generating moral evils for a much wider circle than the bankrupt.

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<sup>197</sup> Thomas Max Safley, "Business Failure and Civil Scandal in Early Modern Europe," *Business History Review* 83, no. 1 (2009). P. 37.

An economics-focused approach might view this as simply a question of good and bad welfare outcomes. However, the weightiness of the issue, means that bankruptcy has traditionally carried a strong normative implication, which though welfare related, stretches well-beyond into the world of 'honour'. The infamy attached to being bankrupt was the antithesis of acting with 'honour'. Bankruptcy had the effect of breaching moral codes, in particular, that of the 'promise' which formed the corpus of agreement rules integral to hundi transactions.

### 3.9 Conclusion

Using legal cases of the period, we see the way in which hundi bound agents together in different contexts. Hundi transactions were conducted within certain frameworks of conduct and agreements between agents. This kind of calculative rationality pervaded the contractual qualities inherent in hundi. Reputation and solvency were decisive matters for the overall health of hundi transactions. While insolvency could and did afflict hundi transactions, resulting in merchant disputes, mechanisms for maintaining collateral security were in evidence. However, economic explanations alone cannot account for the institutional foundations of hundi. As the various cases exemplify, normative considerations did impact on cultural incentives.

What can we impute to the reasons behind the disputing merchants' recourse to the legal enforcement of the British Indian courts? In all the cases, the merchants had forged agreement rules defining the conditions which were necessary for each party's apparent consent to be counted as valid. In the case of *Pragdas Thakurdas v. Dowlattram Nanuram*, the rules governing acceptance of the hundi constituted some of the agreement rules. The plaintiffs argued that their communication of acceptance to the drawer should not be considered a valid consent to the hundi transaction where the

holder of the hundi (Motiram) was concerned. By contrast, the court served to plug gaps promoting differential consent of the contracting parties, through background rules of enforcement derived from English as well as Indian law. In other words, the background rules of the Court provided a coercive element to the agreement rules. We can presume that the background rules of the Court were more coercive than the sanctions and conditions naturally attached to agreement rules.

As we have seen, exogenous elements such as bankruptcy, or insufficient knowledge of interests, could disrupt agreement rules in such a way that the background rules or enforcement of the courts must have appeared the only viable alternative. Normative qualities attached to the concept of honour, could through events such as bankruptcy, make adherence to existing agreement rules secondary to the question of encapsulated interests.

This discussion on Hundi suggests that E&O are right to underscore the importance of the legal system in supporting trade. Functioning in the past with cultural sanctions, the interaction between hundi and the British Indian courts indicates exogenously determined incentives very much impacted on hundi transactions. The cases are also illustrative of endogenously determined agreement rules which sought the enforcement of the Court's background rules for exogenous reasons. The consequences of applying an external legal framework deserve separate attention and are thus dealt with in chapters four and five.

## **Chapter 4 The Tendentious Nature of Hundi Legitimacy: Three Properties of The Indian Stamp Act Under the Microscope**

The South Asian indigenous credit instrument *hundi* is today widely regarded as an informal institution. By *informal*, the general understanding of hundi is that it did not conform to prescribed regulations or forms, rendering it unofficial in character. Hundi's indigenous status in the context of British India is largely responsible for this erroneous perception. However, the application of the ISA to hundi changed the formal quality of hundi, investing it with a degree of inadvertent authenticity.

Transposed into European understanding as a South Asian indigenous bill of exchange, hundi definition had nevertheless remained problematic. Though an ancient South Asian credit instrument, prior to the Indian Stamp Act (ISA: I) of 1879<sup>198</sup> hundi had never been defined by law or by Indian indigenous bankers, and thus its remit and function had never been clearly delineated. The courts often reported on hundi with a very particular idea of what it was. They often treated hundi as an instrument that was unambiguously discrete from promissory notes, letters of credit, and at times, even bills of exchange. Occasionally, there are indications that the courts were uncertain about whether there was a clear distinction between these instruments. However, as discussed in chapter two, hundi could operate in all of these respects, and indeed there were multiple categories of

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<sup>198</sup> "The Indian Stamp Act," ed. Legislative Branch Legislative Department (1879).

hundis, many of which the government did not systematically seek to understand until the PBECRs.

Serving as a unit of analysis, the South Asian credit instrument *hundi* provides the means for examining the ways in which colonial laws could define how indigenous institutions continued to exist and behave. Notably, while *hundi* was included within the remit of the Indian Stamp Act (ISA: I) of 1879 as a bill of exchange, it was excluded from the Negotiable Instruments Act (NIA) of 1881, reasoning that it was indigenous in character. It laid out that *hundi* would only come under the aegis of the NIA when customary rules were lacking. The ISA:I (and subsequent ISAs) did not set out to provide definition for instruments such as *hundi*. Created by the British colonial government, its purpose was to generate revenue by taxing particular kinds of instruments that recorded the transactions of consenting parties. The means devised to realize this purpose was a process of formalization, which encompassed a number of administrative and legal practices.

*Hundi* was one such instrument that fell within the sphere of the ISA. Initially very simply defined as a bill of exchange, the ISA did not seek to provide detailed definition. However, in *hundi*'s case, the application and practice of the ISA, and thus the process of formalization, crucially hinged on this very simple definition. The question of what *hundi* was, and how it should be defined cropped up again and again. In this way, the issue of definition constituted an important by-product of the ISA. In this discussion, the ISA's purpose, which was revenue generation; its means, through the process of formalization; and its by-product of new definition, form the three properties that are scrutinized, and whose impact on *hundi* is evaluated.



#### 4.1 A Good Source of Revenue?

The very inclusion of hundi within the ISA provides grounds for thinking that the instrument was widespread, and had the potential to generate a significant source of revenue for the British Indian government. In the 1890 Annual Report on the Stamp Revenue Administration of the North-Western Provinces and Oudh, the government calculated that aggregate hundi stamp revenue in the six chief provinces of India had increased by about 16 per cent in the last ten years.<sup>199</sup> Hundi revenue is shown to be an important marker of core trade activity both inland, and with Europe, Burma and China.<sup>200</sup>

In the same report, the government expressed concern over the sustained decrease in revenue from hundi stamps for the North-Western Provinces and Oudh.<sup>201</sup> These provinces, the main subject of the report, were particularly important as a means for viewing hundi income, because hundi stamp revenue in these locations exceeded all other provinces or presidencies apart from Bombay and Bengal.<sup>202</sup> And even with these two exceptions there was an understandable difference in takings because Bombay and Bengal are described as hubs for foreign as well as inland exchange.<sup>203</sup>

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<sup>199</sup> "Report on the administration of the Stamp Revenue of the Stamp Department of the North Western Provinces & Oudh for 1890-91, and Resolution of the Local Govt thereon. Explanation of the cause of the decline in the use of Hundi stamps in the NW Provinces & Oudh." P. 10. See Appendix A.

<sup>200</sup> Ibid.

<sup>201</sup> "Letter from the Secretary to the Board of Revenue, North-Western Provinces, giving cover to the Report on the Administration of the Stamp Revenue in the North-Western Provinces and Oudh for 1889-90," (6th September 1890). P.3.

<sup>202</sup> "Report on the administration of the Stamp Revenue of the Stamp Department of the North Western Provinces & Oudh for 1890-91, and Resolution of the Local Govt thereon. Explanation of the cause of the decline in the use of Hundi stamps in the NW Provinces & Oudh." P. 10.

<sup>203</sup> Ibid.

David Cannadine suggests that British imperialists were eager to export their institutions and apply them to the colonies,<sup>204</sup> but this was not the case initially. The ISA was not intended to frame credit operations in detail, but rather a laissez faire philosophy towards credit operations that were revenue rich. Appropriation provided the core impetus for the Act. Thus, in the decade following the ISA, government proceedings in the Finance and Commerce department reflected a desire to create a body of regulations which took into account existing credit operations amongst European and indigenous merchants. To attempt to alter or redirect indigenous credit operations was never a consideration because the government lacked sufficient insight into the operations of Indian merchants.

In so far as this did not interfere with the aim of appropriation, government officials even considered ways of maintaining the integrity of existing operations. When hundi revenues exhibited a decline in the North-Western Provinces and Oudh because of competing remittance methods, the government took the trouble to assess conditions for its decline. We see that hundi is important enough for the Commissioner of Stamps to direct much of his attention in this early 1890s report, towards investigating the issues reducing hundi's popularity.

The enquiry highlighted the increasing popularity of other remittance methods, such as currency notes, and contrasted their efficiency with hundi:

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<sup>204</sup> David Cannadine, *Ornamentalism : How the British Saw their Empire* (London: Allen Lane, 2001).

No remitter will be at the expense, trouble and risk of using hundis as long as he can get currency notes, and considering the risk, trouble and expense involved in the use of hundis as compared with other modes of remittance, it is not surprising that the revenue from hundi stamps has not largely increased; the surprising circumstance appears to be that the hundi stamp revenue has not considerably decreased, owing to the extent to which hundis are handicapped in competing with the many modern modes of remittance with which hundis have nowadays to contend.<sup>205</sup>

The Commissioner of Stamps seemed to intimate that the life-span of hundis, as an institution, was limited. However, despite alluding to hundi's cost, more complicated usage, and risk, there was a suggestion that some aspects of hundi practice may have been crippled by various mitigating circumstances. A recent Civil Court ruling that "Hundi paper cannot be legally used for the higher kinds of promissory notes"<sup>206</sup> was mentioned. "A large proportion of the hundi stamps hitherto purchased were used for *Ruqqas*" (promissory notes), explained the Commissioner in the report.<sup>207</sup> Following the ruling, "much of the blank hundi paper hitherto held by the Banks has been returned for refund of the stamp duty", and only "smaller stocks of hundi stamps are now kept by money lenders."<sup>208</sup> The Commissioner concluded that an even greater decline in the sale of hundi stamps might be expected in the future. With implications for the applicability and practicality of the ISA, the matter of issuing promissory

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<sup>205</sup> "Report on the administration of the Stamp Revenue of the Stamp Department of the North Western Provinces & Oudh for 1890-91, and Resolution of the Local Govt thereon. Explanation of the cause of the decline in the use of Hundi stamps in the NW Provinces & Oudh." P.9.

<sup>206</sup> "Letter from the Secretary to the Board of Revenue, North-Western Provinces, giving cover to the Report on the Administration of the Stamp Revenue in the North-Western Provinces and Oudh for 1889-90.", p.4.

<sup>207</sup> "Report on the administration of the Stamp Revenue of the Stamp Department of the North Western Provinces & Oudh for 1890-91, and Resolution of the Local Govt thereon. Explanation of the cause of the decline in the use of Hundi stamps in the NW Provinces & Oudh.", p.11. *Ruqqas* is an indigenous term for promissory notes.

<sup>208</sup> Ibid.

notes on hundi paper was weighty, and one that was not resolved easily, as we shall see later in this discussion.

Another suggestion made is that hundi had an unequal playing field, since hundi stamp duty rates were higher than other forms of remittance.

The rates of stamp duty chargeable on hundis have undergone but slight change since 1862, and it is a question whether these rates should not be lowered in order that hundis may be placed more on a par with other modes of remittance. Such a reduction might possibly, as in the case of the penny postage, lead to an increase in stamp revenue.<sup>209</sup>

Rather than writing off hundi as obsolete or ineffective—a natural conclusion when other methods were gaining in popularity—the government considered ways of reinvigorating the use of hundi. The fact that a reduction of hundi stamp duty was discussed, provides some sense of the value of hundi revenue streams.

Apart from the thorny issue of paying tax, the ISA also complicated and even restricted merchants' usage of hundi in other ways. Hundis had such wide currency amongst Indian merchants that the British Indian government was faced with problems of jurisdiction. Indian merchants incurred double stamp duty during transactions from British India to the various princely states, and vice versa. This issue of double stamp duty acts as a filter for two core facets of hundi practice. The first was hundi's importance to the government as a means of collecting revenue from trade; it demonstrated hundi's pervasiveness and significance to Indian merchants as a tool of trade. Second, the question of jurisdiction highlights the way in which the

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<sup>209</sup> Ibid. P.11.

administrative architecture and legal system of British India had become an inextricable part of hundi's functioning.

In 1895, the Foreign Internal department of British India discussed whether a merchant which had drawn a hundi in the state of Travancore should be exempt from paying more stamp duty in British India. Citing the exemption provided to bills and cheques drawn in Mysore, the Government of Madras put forward a case for reciprocal exemption on stamp duty liable on such instruments drawn in Travancore. Three arguments were advanced in favour of this exemption: the degree of similarity between the rates of stamp duty owed on such instruments in the state of Travancore and those in British India; the precedent set by exemption granted to Mysore in 1865; and doing away with the privation to merchants caused by the double stamp duty.<sup>210</sup> However, closer inspection revealed that while rates of stamp duty within Travancore were "modelled" on British Indian law, they were not entirely the same. Even though exemption was seen to provide mutual gain to British Indian interests and the native state of Travancore, the variances in stamp rates proved to be an administrative hurdle.

The implications of this impediment were specifically linked to legal arbitration in British courts if a suit was launched on a bill transacted according to the native state's law. Examining their reasons for rejecting exemption to Indore in 1865, the British Indian government recalled that arbitrating on the issue of the legality of State stamps under native law, would be "impracticable , and would only serve as a vexatious defence any

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<sup>210</sup> "Proposed exemption from Stamp-duty of cheques and bills drawn in Travancore and negotiated in British India, negatived. Foreign, Internal A, Progs. Nos. 136-140, January 1895.," (Foreign, Internal A, Proceedings nos 136-140, January 1895). P.2.

time a suit was instituted on a bill purporting to be stamped according to the Indore law."<sup>211</sup> Finally, reciprocal exemption was deemed "premature", on the grounds that Travancore circulated a currency that was different to British Indian currency.

British Indian and Native State interests were very much a part of the decision-making process over whether reciprocal exemption should be granted. This was particularly apparent in 1908, when the Cochin and Madras Chambers of Commerce put forward a proposal to grant reciprocal exemption of double stamp duty. The proposed exemption related to "hundis and bills of exchange drawn or made out in the Cochin and Travancore States and subsequently presented or otherwise negotiated in British India, and vice versa".<sup>212</sup> In this instance, the Cochin Darbar<sup>213</sup> opposed this proposal despite the noted "hardship" to trade because they were unwilling to give up the extra revenue from hundi stamps. The Darbar's opposition was also based on the opinion that more hundis from British India tended on average to be presented in the Cochin State than vice versa.<sup>214</sup>

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<sup>211</sup> Ibid. P.3.

<sup>212</sup> "Rejection of the proposal made by the Cochin and Madras Chambers of Commerce regarding the exemption from liability to the payment of double stamp duty of hundis, bills of exchange, etc., drawn or made out in the Cochin and Travancore States and subsequently presented or otherwise negotiated in British territory and vice-versa. Foreign, Internal-B, Proceedings. No. 234," (January 1908). p.1.

<sup>213</sup> Darbar is the Hindi word for court

<sup>214</sup> "Rejection of the proposal made by the Cochin and Madras Chambers of Commerce regarding the exemption from liability to the payment of double stamp duty of hundis, bills of exchange, etc., drawn or made out in the Cochin and Travancore States and subsequently presented or otherwise negotiated in British territory and vice-versa. Foreign, Internal-B, Proceedings. No. 234." P. 16.

## 4.2 The Rocky Road to Formalization

Another key indicator of hundi's value to the government, was the means adopted to formalize the practice of hundi. The prevention of tax evasion and fraud were integral to the process of applying the ISA. Earlier stamp acts had already met with resistance from Indian merchants. One emotive petition to the government by the merchants of Calcutta against the introduction of an 1828 Stamp Regulation (Regulation XII) within Bengal, read as follows:

8. The native shroffs, in particular, have already taken the greatest alarm, and contemplate abandoning an occupation which they could not pursue without ruin under the provisions of the Stamp Regulation.

9. In every country, such a tax must produce great inconvenience in its operation, and be attended with great vexation in its collection; but, circumstanced as this country is, your Petitioners avow their belief, that if the regulation should be carried into effect, commercial dealings would be impeded, to a degree affecting public credit, and that money transactions would be wholly suspended.<sup>215</sup>

Despite such dramatic incursions on Regulation XII, the stamp tax was still introduced. However, such was the level of resistance to the tax that even the government soon recognized, albeit in a footnote, that the stamp tax was disregarded in the provinces. "The Stamp Regulation in the provinces is, in fact, a dead letter, as far as regards bills, receipts & c., from the passive but obstinate resistance of the *shroffs*, or native bankers."<sup>216</sup>

In 1880, alongside the issue of securing revenue, the government was keen to ensure that there was a system in place within which hundi could operate and be formally recognized. No expense appears to have been spared on

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<sup>215</sup> "An Appeal to England Against the New Indian Stamp Act; with Some Observations on the Condition of British Subjects in Calcutta, under the Government of the East India Company," (James Ridgeway, Piccadilly, London, 1828). P.114.

<sup>216</sup> Ibid. Appendix, p.105

costly measures to introduce “tinted paper bearing an impressed stamp”<sup>217</sup> for hundis or inland bills of exchange. A supply of “special English-made hundi paper” amounting to five years’ estimated consumption, was ordered to replace the old system of adhesive stamps for bills of exchange.

Exacting in its prescription of rules to instruments, the Indian Stamp Act was initially very strict in its interpretation of what could validly be regarded as a hundi. The relatively innocuous sounding term “duly stamped” proved extremely complex in application. For a hundi to be *duly stamped*, certain rules needed to be adhered to which regulated the size and type of paper on which hundis were written.<sup>218</sup> In certain circles, these documents were perceived and accepted as hundis, but they did not correspond to the Act’s description of articles which were *duly stamped*. Small details carried major implications for hundi acceptance.

One such detail concerned whether a promissory note written on an impressed sheet bearing the word “hundi” could be classed as *duly stamped* as per the meaning of the ISA(I). In 1890, the case of Mashuk Ali *versus* S. Gazzaffer Ali Khan and another, proved pivotal to determining the form of promissory notes and hundis. The case centred on the recovery of R4,314.12 which was claimed to be due on a promissory note written on a 3-rupee impressed sheet carrying the word “Hundi”. Ruling against the validity of this claim, the Judicial Commissioner of Oudh reasoned that the note was

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<sup>217</sup> "Arrangement with Messrs. De La Rue & Company for the supply of Hundi stamped papers. Proceedings Nos. 1921-1923, Finance & Commerce, Separate Revenue Statistics and Commerce, Part A ", (October 1880).

<sup>218</sup> "Question Whether a Promissory Note Written on an Impressed Sheet Bearing the Word "Hundi" is Duly Stamped within the Meaning of the Indian Stamp Act, I of 1879. Proposed Amendment and Consolidation of the Rules Issues under the Indian Stamp Act, I of 1879. Proceedings Nos. 1227-1231, Finance & Commerce Department, Separate Revenue Branch, Part A," (November 1890).



not “duly stamped”, as per the description of the Indian Stamp Act, and was thus not admissible as evidence.<sup>219</sup> The key problem was that according to Section 9/33 of the Act the promissory note had been stamped with the correct amount, but was written on an impressed sheet marked “Hundi”.

However, this judgement was later deemed inherently problematic. While the Lieutenant Governor and Chief Commissioner felt that the Judicial Commissioner’s decision was of “doubtful legality”,<sup>220</sup> the overarching issue appears to have been that a number of similar promissory notes payable for large sums of money, were already in circulation in the Province of Oudh.<sup>221</sup> The Lieutenant Governor felt that more damage might follow if such promissory notes, which, in any case, carried the correct stamp duty, were rejected. He was concerned that “dishonest debtors” would take advantage of this aspect of the law in order to “defraud their creditors who in good faith had advanced them money on documents which they believed to be valid securities.”<sup>222</sup>

The Lieutenant Governor sought independent legal counsel on the appropriateness of the Judicial Commissioner’s decision. The barrister consulted, explained at some length that the Judicial Commissioner who had first ruled on this case, was wrong, and that the promissory note was duly stamped. The first judgement was appealed, at which point the District Judge revoked the earlier decision, reasoning that “Stamp Acts have to be interpreted liberally,” and because “the use of sheets marked ‘Hundi’ is not

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<sup>219</sup> Ibid. P.1.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

expressly prohibited.”<sup>223</sup> The matter was then brought to the attention of the Government of India in order to amend the wording of the Stamp Act so that future misreading of this kind could be prevented.

The arguments of the barrister consulted in this case are worth reviewing here. A number of ambiguities regarding the law and its applicability to hundi and promissory notes, emerge from the barrister’s scrutiny. He pointed out that the law required promissory notes chargeable with a duty of 6, 10 or 12 annas,<sup>224</sup> to be written on impressed sheets bearing the word hundi. The law did not stipulate that other promissory notes should or should not be written on impressed sheets marked hundi. However the Judicial Commissioner’s decision to impound a promissory note so written, but chargeable with 3 annas duty, did indeed “confound the permissive with the compulsory use of hundi paper.”<sup>225</sup>

This kind of complexity in the law raises a number of questions. What was the merchants’ rationale behind the use of impressed sheets marked hundi for promissory notes in all circumstances? Why did the ISA require that higher value promissory notes be written on impressed sheets marked hundi? In laying down such requirements, was customary practice built into the law? In other words, was there a fuzzy boundary between the use of promissory notes and hundis anyway?

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<sup>223</sup> Ibid. P.2.

<sup>224</sup> Promissory notes with a value exceeding R 400, but not exceeding R,1200.

<sup>225</sup> "Question Whether a Promissory Note Written on an Impressed Sheet Bearing the Word "Hundi" is Duly Stamped within the Meaning of the Indian Stamp Act, I of 1879. Proposed Amendment and Consolidation of the Rules Issues under the Indian Stamp Act, I of 1879. Proceedings Nos. 1227-1231, Finance & Commerce Department, Separate Revenue Branch, Part A.", p. 5.

One clue is provided by a government respondent who commented on proposals to amend the ISA's wording:

But I would submit that in view of the practice which has so largely prevailed of drawing promissory notes on hundi paper it may perhaps be expedient to recognize the practice and allow it to continue. I learn from bankers that they are anxious that this should be done, no doubt because they hold notes stamped on such paper. There seems to be no good reason for not allowing the practice.<sup>226</sup>

We learn from this that the practice of drawing promissory notes on hundi paper was well established. However, it does not answer how this kind of usage came into being. Was it because of a lack of clarity in the law, or a reflection of mercantile custom predating the law? This is an important point because it provides some clues about what hundi was. Was there a clear distinction between hundis and promissory notes? Or did the law create a particular kind of distinction that did not exist before?

Ironically, one explanation for this confusing practice is provided by the highly prescriptive nature of the ISA (I). In December 1882, an amendment was made to the Indian Stamp Act rules that had been published on March 3<sup>rd</sup> 1882, under Notification No. 1288. Rule 6(A) resulted from this amendment. It was this new rule which required promissory notes chargeable with stamp duty of 6, 10, or 12 annas to be written on impressed sheets of these values marked with hundi. The government discussion which followed the 1890 case described previously,<sup>227</sup> revealed that it was not clear to all government legislators why certain rules had been prescribed in the first place. In February 1891, the Calcutta Collector of Stamp Revenue cites his predecessor to explain the rationale behind Rule 6(A). We learn that

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<sup>226</sup> Ibid. P.12.

<sup>227</sup> See note 19.

Notification 1288 prescribed no particular description of stamp for promissory notes. And, the absence of the word 'promissory note' in Clause 20, Rule 8 of the Governor General's Rules under the ISA (I), meant that promissory notes could not be stamped with *impressed labels*. In fact, promissory notes had to be written on impressed sheets.

However, no provision was made for promissory notes chargeable with stamp duty rates of 6, 10, and 12 annas. Members of the public were left with two options only: either they used an impressed sheet with higher denominations of stamp duty, which was "unfair", or they availed of impressed sheets marked hundi of the same value.<sup>228</sup> On the other hand, impressed sheets not marked hundi were also regarded as "inconveniently large for the purpose"[of promissory notes]. This consideration is also ascribed as promoting the use of hundi marked impressed sheets for promissory notes. Presumably, hundi impressed sheets were smaller and more appropriately fit for purpose. Why was this practical issue not reflected in the law?

Definitions of bill of exchange, promissory notes and hundi, had never been given much attention in the ISA of 1879. This neglect of definition led to further practical problems of application. Schedule I of the ISA prescribed duty on *one particular* kind of instrument, implying that each instrument was discrete. Certainly, by law promissory notes and bills of exchange were regarded as different instruments. Nevertheless, Article II of the ISA then placed bills of exchange and promissory notes into the same category of

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<sup>228</sup> "Consolidated Rules Under Indian Stamp Act, I of 1879, &c. Proceedings nos. 395-405, Finance and Commerce Department, Separate Revenue Branch, Part A.," (June 1891). P. 3.

stamp rate duty. The net practical effect of this was to blur the two categories of instruments.

While the Indian Stamp Act was exacting in its prescription of rules to instruments, it was far less precise, initially at least, on the question of what could validly be interpreted as hundi. In chapter one, we saw that a hundi was not merely a bill of exchange. In serving the multiple functions of bill of exchange, promissory note, letter of credit and remittance vehicle, hundi was both a credit instrument and a system. Since stamp legislation in India had largely borrowed from English law, an indigenous instrument such as hundi could only earn an approximate English equivalent. Consequently, hundi was included under the umbrella of “bill of exchange” within the ISA of 1879. As we shall see in the next section, the government later regarded this description as inadequate. One key reason for this was that the term ‘bill of exchange’ was hardly addressed in any definitive sense initially.

### 4.3 Definition Resurfaces

In seeking to extract revenue from hundi, the British wished, in some measure, to bring an indigenous credit practice into the domain of the government. The specially imported impressed sheets prescribed for hundi usage<sup>229</sup> reflect the value of the system, and the process of standardising hundi transactions. This process of formalization was also essential because hundi practices had always been determined by mercantile custom. With mercantile custom differing from community to community, the government was encumbered with the task of ironing out variations in the form of hundi. It was a task fraught with difficulty, and the exceptions to commonly

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<sup>229</sup> See earlier discussion on pp. 5-6.

understood forms of hundi, transformed the matter of defining bills of exchange and hundis, from its earlier position of obscurity, into a question of prominence.

Documents very like hundis, but operating under other names, excited the attention of the Indian government in 1890. Two in particular, *samachari chittis* and *barati chittis*, triggered a debate within the Finance and Commerce department. Used by Indian merchants to transfer credit, these documents shared many characteristics in common with promissory notes, letters of credit, bills of exchange and hundis. Since these instruments were not previously defined by law, they operated without stamp duty. Government administrators suspected that wholesale tax evasion might be at play, particularly since hundi stamp revenue had fallen wherever these instruments operated.<sup>230</sup>

The impetus for the government's examination of what hundi was, gathered momentum through this enquiry into hundi-like instruments. Samachari chittis created confusion in the minds of stamp administrators because they appeared to function as both letters of advice and hundis.<sup>231</sup> In seeking to determine whether samachari chittis corresponded with hundis, the government compared samachari operations with their understanding of bills of exchange. This kind of comparison was the only means of grasping what these chittis were, because hundis were not something the government could fully comprehend anyway, a point which we will return to shortly.

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<sup>230</sup> "Report on the administration of the Stamp Revenue of the Stamp Department of the North Western Provinces & Oudh for 1890-91, and Resolution of the Local Govt thereon. Explanation of the cause of the decline in the use of Hundi stamps in the NW Provinces & Oudh." P.8.

<sup>231</sup> Ibid.

Having regard to the terms of section 5, Act XXVI of 1881 (the Negotiable Instruments Act), it is difficult to see how such orders could be worded so as not to come within the definition of 'bills of exchange,' for they are usually, if not always, unconditional orders signed by the makers, directing certain persons to pay certain sums to or to the order of certain persons...<sup>232</sup>

The above description was a preliminary comparison with bills of exchange by the Commissioner of Stamps in his report on the North-Western Provinces and Oudh early in 1891. Some months later in the same year, on the basis of further correspondence and specimens of samachari chittis, the Board of Revenue of this district made the following observations:

4. It seems to the Junior Member that all these documents may be classed under one of three denominations –

(1) Letters of advice, pure and simple, which are not liable to stamp duty under any provision of Act I of 1879.

(2) Letters of credit, which are liable to a stamp duty of one anna under Act I of 1879, Schedule I, No. 41, irrespective of amount.

(3) Hundis or bills of exchange, liable to a variable duty under Act I of 1879, Schedule I, No. 11.

Between the last two classes and the first the distinction is plainly marked, but it is less clearly so between classes (2) and (3).<sup>233</sup>

Once again, the ambiguity between definitions of letters of credit, bills of exchange and hundis is exemplified by this analysis. It is also clear that the question of defining samachari chittis brought to light the need for better clarification of credit terms quite apart from those of indigenous origin. As mentioned previously, one of the key problems of the ISA and the Negotiable Instruments Act (NIA) of 1881, was that they described credit

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<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

instruments as discrete entities. English instruments of credit were expected to fit neatly into these categories, and this expectation of neatness was transposed into the Indian context. In effect, the ISA and the NIA did not provide flexibility in the classification of instruments. There was no expectation that indigenous instruments could perform several functions. But the confusion surrounding samachari chittis was entirely about being able to distinguish when a samachari chitti acted as a simple letter of advice, and when it performed like a letter of credit or bill of exchange.

Several samples of samachari chittis were obtained by the Board of Revenue, and these multiple specimens were instrumental in revealing the elusiveness of indigenous instruments. The Legal Remembrancer to the Government of the region responded to the evidence by acknowledging the idiosyncrasies of samachari chittis:

...I have arrived at the conclusion, in default of any evidence of local usage affecting these instruments (section 1, Act XXVI, 1881), that those of the *samachari chittis*, which are not letters of advice sent by a banker to a correspondent informing him that a hundi has been drawn on him, but which are *independent authorities* given by a banker to his correspondent to pay a certain sum of money to a specified third person, are in form bills of exchange within the definition of section 5 of Act XXVI of 1881, and, as such, should be stamped before the instrument leaves the hands of the drawer. It may be noted, however, that these *samachari chittis* or independent orders to a certain person to pay a certain sum of money to a *specified person* are not negotiable instruments within the meaning of section 13.<sup>234</sup>

At the same time, amongst many Marwari mercantile firms in Calcutta and other areas of Bengal, a habit prevailed of remitting money, and conducting transactions using *barati chittis*. Once again, the government seems to have been convinced that these were cleverly designed to evade stamp duty.

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<sup>234</sup> (3) p. 12.



Whether these instruments existed before the advent of the ISA is unclear. Undoubtedly, the ISA threw into sharp relief any instrument of credit that was untaxed, and which presented a potential source revenue of revenue for the government. In this instance, the government believed that *barati chittis* were, for all practical purposes, *hundi* or bills of exchange.

It has been brought to the Board's notice that Marwari firms in Calcutta and other towns in Bengal are in the habit of transmitting money from one to another and carrying on transactions in which money passes from hand to hand by means of ingeniously worded documents serving practically the purpose of *hundis* or bills of exchange which yet cannot be distinctly declared to be *hundis*. These documents are negotiated without being stamped, and much loss to the stamp revenue results from their use.<sup>235</sup>

But proving the negotiability of *barati chittis* created the biggest obstacle to its taxation. Determining the negotiability of credit instruments was paramount to application of the ISA. Thus, once the NIA was instituted, government administrators frequently referred back to its definitions. As mentioned earlier, though *hundi* was only supposed to be governed by the NIA when customary law could not apply, in reality, even its perceived negotiability was eventually framed by the NIA.

However, since there was no proper frame of reference for *hundi's* definition within the NIA, it also proved very difficult to make a case for *barati chittis* being *hundis*. A case arose in 1889 in which certain Calcutta-based Marwari

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<sup>235</sup> "Question whether certain "Barati Chitees" are or are not bills of exchange within the meaning of the Indian Stamp Act, 1879. Suggestions made by the editor of the "Indian Daily News" for Certain Alterations in the Stamp Act. Finance and Commerce Department, Separate Revenue Branch, Part A, Progs. Nos. 1057-1070.," (October 1889)., p. 4.

firms were found to have been conducting business with barati chittis, and were accordingly charged with evading stamp law. On scrutiny of these documents, the High Court of Judicature at Fort William in Bengal, could not verify whether these barati chittis were examples of hundis, bills of exchange or promissory notes.<sup>236</sup> The judges concerned felt that the instrument was particularly ambiguous since it manifested properties of all three types of instruments. Facts of the case were limited, presenting an obstacle to resolving the issue of the documents' identity.

We learn that Marwari merchants' use of barati chittis placed a considerable dent in the government's hundi coffers.

From enquiries made by me, it appears that the Marwari firms in Calcutta transact business in *hundis* to the amount of about 60 lakhs a month, or 720 lakhs per annum—a fact which will give some idea of the extent to which the stamp revenue is defrauded.<sup>237</sup>

The Calcutta Collector of Stamp Revenue estimated that the application of stamp duty on these instruments would boost hundi revenues in Calcutta "by at least 50 per cent."<sup>238</sup> However, in this instance, the ISA's application crucially depended on successfully terminating the case in question.

The prosecution particularly sought to find out whether the documents were hundis, and whether the defendant's firm negotiated them as per the

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<sup>236</sup> "Question whether the terms Bill of Exchange and Hundi should be defined in the Indian Stamp Act, 1879. Finance & Commerce, Separate Revenue, Progs., nos. 761-791, Part A.," (1891). P. 2.

<sup>237</sup> "Question whether certain "Barati Chitees" are or are not bills of exchange within the meaning of the Indian Stamp Act, 1879. Suggestions made by the editor of the "Indian Daily News" for Certain Alterations in the Stamp Act. Finance and Commerce Department, Separate Revenue Branch, Part A, Progs. Nos. 1057-1070..", P. 5.

<sup>238</sup> *ibid.*, P.5.

meaning of the Stamp Act.<sup>239</sup> However, several other questions arose in the process of trying to answer the above. In addition to verifying whether the instruments scrutinized were hundis, the process by which these documents could be so verified was equally important. In other words, through what characteristics were these documents identifiable as hundis?

The circumstances by which the government became aware of the defendant's use of the barati chittis add important information about the nature of the instrument. The defendant's firm, Bhoyrudan Golaicha, was involved in a dispute with a Calcutta Marwari firm—Mysing Megraj—over these documents. Mysing Megraj had advanced capital necessary for the purchase of jute to Bhoyrudan Golaicha's manager Sewjee Ram. As per the firms' agreement, Sewjee Ram had drawn three Baratti Chittis on Mysing Megraj, and had delivered them to his firm, Bhoyrudan Golaicha. Another condition of the agreement was that the bill-of-lading<sup>240</sup> for the jute would be delivered to the firm Mysing Megraj, where it was consigned for sale. However, because the jute had been sold at a loss, a law-suit resulted between the two firms in the Calcutta Court of Small Causes.

In this instance, the Bhoyrudan Golaicha was both the drawee and the payee of the chittis; and no endorsement was necessary for negotiating the Barati chittis. These conditions fed the Defence's chief argument: that the Barati chittis could not be hundis because it would then have been necessary for the transaction to have referred to three persons. As the prosecution advanced its arguments asserting that barati chittis were hundis, a particular

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<sup>239</sup> *ibid.*, P.6.

<sup>240</sup> A bill of lading provided a written acknowledgement of the receipt of goods.

construction of hundi becomes clear, which appeared to be at odds with the functioning of barati chittis. (See table 4.1.)

**Table 4.1 Illustration of the contrast between the construction of hundi and barati chittis.**

<b>Construction of how a hundi worked in principle</b>	<b>1<sup>st</sup> Person Who made the order</b>	<b>2<sup>nd</sup> Person Who received the order</b>	<b>3<sup>rd</sup> Person Who benefited by the order</b>
	A Drawer The person who draws the instrument	B Drawee The person who is expected to pay an instrument when it is presented for payment	C Payee The person to whom the instrument is payable
How the Barati chitti worked	Bhoyrudan Golaicha	Mysing Megraj	Mysing Megraj

The government was more interested in the mechanisms that effected the negotiability of barati chittis. How was the endorsement of the instrument enforced? And if the barati chittis were not hundis, why were they entered into the defendant's accounts as hundis, and copies taken in their 'hundi copybook'?

Mr Garth, the Barrister who was specially consulted on the matter of evidence, advised the prosecution to obtain oral evidence from Marwari merchants. Garth recognized that the matter of proving these documents to be hundis could only be undertaken with reference to local mercantile usage, particularly since the ISA and other Acts did not contain any definition of hundi. He also recommended calling the native interpreter (*Munshi*) from the Bank of Bengal to act as one of the witnesses.

But in this case the Court has to deal with the Stamp Act which, while enacting that '*a bill of exchange includes a hundi*,' contains no definition of the latter term, which is not defined, so far as I am aware, in any other Act of the Legislature. For the purpose, therefore, of deciding what is or is not a *hundi*, it appears to me that the Court must have regard to local mercantile usage, which can only be proved by oral evidence. The prosecution should therefore be prepared with the evidence of two or three Marwari merchants or persons accustomed to deal with Marwari merchants to show that these documents are *hundis*, and as such, negotiable in the market. The Munshi from the Bank of Bengal, who attended the conference held in this matter, should be called as one of the witnesses.<sup>241</sup>

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<sup>241</sup> "Question whether certain "Barati Chitees" are or are not bills of exchange within the meaning of the Indian Stamp Act, 1879. Suggestions made by the editor of the "Indian Daily News" for Certain Alterations in the Stamp Act. Finance and Commerce Department, Separate Revenue Branch, Part A, Progs. Nos. 1057-1070..", P. 6.

The first question that was asked of those called to give evidence, was whether the *barati chittis* were *hundis*. For the government, the question proved frustratingly inconclusive. All three merchants who were called to serve as witnesses, stated that the documents were *hundis*, but when cross-examined further, stressed that the papers were merely written like *hundis*, and lacked the various qualities which were associated with *hundis*. The missing characteristics were described as negotiability in the bazaar, clear endorsement, and an unmistakeable indication of the payee. Even more damaging to the prosecution's case, was the testimony from the Bank of Bengal's Munshi. Though he was expected to be, in the words of the Magistrate, "the most hopeful witness of the experts", his analysis of the documents contradicted the prosecution's interpretation of these documents. The Munshi's testimony verged on the farcical, betraying an uncertainty on the matter of defining *hundis* which seriously undermined any assertion that these *barati chittis* were *hundis*. On the Munshi's testimony the Magistrate made the following comments:

He is a translator of *hundis* in the Bank. He is positive that these papers are *hundis*, but he does not appear to be so happy in his translation and interpretation of these documents as he generally is at the Bank of Bengal. He upsets the whole theory of the prosecution by saying—"In exhibit C the drawee is Mysing Megraj Kotari, and Bhoyrudan is the drawer, *but the payee is also Bhoyrudan*. Then he says—"Exhibit D is exactly like C. B is also like C. B, C, and D are like each other." Nothing could be more absurd than the interpretation that the amounts mentioned in B, C, and D, are payable to Bhoyrudan.<sup>242</sup>

Faced with this contradictory evidence, the Prosecution tried to argue in its concluding address that the court should consider the *barati chittis* as promissory notes if it did not believe them to be *hundis*. This appeared to

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<sup>242</sup> *ibid.*, P.14.

have been a desperate measure on the part of the Prosecution, and the weakness of this closing bid was demonstrated by the Magistrate's decision to dismiss the case and acquit the defendants. One apparent weakness of the prosecution's assertion, was that promissory notes were already defined in the Negotiable Instruments Act. The Magistrate had merely to glance at that definition to perceive the insufficiency of likening these instruments to promissory notes.

Unlike promissory notes, definition of hundi was never a matter for real consideration until practical problems arose. As discussed, the ideological background of the ISA was the regulation of hundi, and sustenance of its revenues without impairment of its integrity. However, the British had no real depth of understanding in relation to indigenous institutions, and there was a keen consciousness of this in some quarters. When the government enquired of select officials whether the terms 'bills of exchange' and 'hundi' should be defined in the Indian Stamp Act of 1879, one response indicated that an embarrassing ignorance of this area was more likely to be uncovered than any real benefit for the law.

The Assistant Commissioner, Ajmere, thinks it undesirable to define the word "hundi," as a complete definition of the word would, he conceives, be difficult to find and be more likely to embarrass than to assist Courts and Revenue officers. In his opinion the definition of "bill of exchange" proposed in section 3 (2) of the Resolution would appear to meet all requirements.<sup>243</sup>

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<sup>243</sup> "Decision that legislation is not necessary for the purpose of defining "Bill of Exchange" and "Hundi" in the Stamp Act so as to include "Barati Chittis" or of bringing "Samachari Chittis" within the scope of the Act. Finance and Commerce Department, Separate Revenue, Progs. Nos. 436-602, part A." pp. 1-2. From Colonel G.H. Trevore, Chief Commissioner, Ajmere- Merwara, to The Secretary to the Government of India, Finance and Commerce Department, 4<sup>th</sup> April, 1892.



Similarly, a Banker and Honorary Magistrate of Delhi seemed to indicate that since hundis were well-understood within indigenous business circles, further definitions was unnecessary. In fact, he even suggested that any government effort to create definition was likely to be less than authentic, and to clash with mercantile practice.

In reply to your Circular No. 51, dated the 15<sup>th</sup> January 1892, I beg to inform you that it does not appear necessary that the word "*hundi*" should be defined expressly for the purposes of the Stamp Act. The word is a well-known one among merchants and bankers, and though some sorts of letters, more or less similarly worded, have been coming into use as *hundis*, yet the characteristics of a hundi are distinct, and while it is not necessary that the payee should be designated therein, no document can be hundi unless it is styled as such and mentions the deposit of money with the drawer. Any artificial extension of the term for the purposes of the Stamp Act will have a tendency to introduce confusion as to the mercantile incidents of the hundi itself and will therefore be inconvenient.<sup>244</sup>

Both responses also, to a degree, indicate the practical challenge of verifying what hundi was. The District Judge of Cawnpore was equally emphatic, stating that vernacular labels such as hundi were redundant and their usage should be eradicated from the ISA. At the heart of his comments, there appeared to be an inherent desire to standardize all terminology relating to credit instruments.

There is no more occasion for using a vernacular term in an English Stamp Act for the instrument known as hundi than for using a vernacular term in such an Act for an instrument of partition or a power-of-attorney. Instruments should be stamped with reference to their object, their value, and their negotiability, or non-negotiability, the language and form in which they are written being held, for stamping purposes, to be immaterial.<sup>245</sup>

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<sup>244</sup> Ibid. pp. 6-7. From Lala Shri Kishen Dass Gurvala, Banker and Honorary Magistrate, Delhi, To – The Deputy Commissioner, Delhi. 9<sup>th</sup> February, 1891.

<sup>245</sup> Ibid. P.45.

Most respondents on the question of defining a bill of exchange or hundi sought to avoid the pitfalls of addressing hundi definition, but proposed different methods of achieving this. The Secretary for the Upper India Chamber of Commerce in Cawnpore thought it inadvisable to include vernacular words and phrases within either the ISA or the NIA. He held that vernacular words such as hundi were prone to having “varied and elastic meanings”.<sup>246</sup>

Unsurprisingly, the government eventually decided that legislation was neither necessary nor expedient for the purpose of defining ‘bill of exchange’ or ‘hundi’. It was felt that at most, a more general definition of ‘bill of exchange’ was advisable, but one which nevertheless included a specific reference to barati chittis and other similar instruments. The question of explicitly labelling an instrument negotiable, was also seen as potentially problematic. This was a matter which the government considered the Courts were better equipped to ascertain on a case by case basis.<sup>247</sup>

#### 4.4 Conclusion

The Indian Stamp Act of 1879 illuminates three aspects of hundi: its function as a revenue generator; some of its operational mechanics and parameters through the British Indian government’s process of formalization, as well as an indication of the importance of British Indian legislation, and its courts in particular; and finally, the inadequacy of transposing British definitions to frame hundi operations. As an important revenue stream, the government felt that hundi was significant enough to investigate reasons for its decline. Even with the noted rise in popularity of other remittance methods, the

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<sup>246</sup> Ibid. P.45.

<sup>247</sup> Ibid. PP.84-85.

government was keen to ensure that hundi revenue streams remained constant and considerable. Hundi's ability to generate significant revenue was essentially the prime motivation for its inclusion within the Act. Securing the revenue and preventing tax evasion, provided the impetus for the Act's process of formalization, and, in an indirect sense, redefinition of hundi.

In laying out a body of rules governing the use of hundi that were highly prescriptive in character, customary usage of the system at times came into conflict with the administration. Merchants were charged double stamp duty when conducting transactions to and from British India and most princely states. Stamp revenue was such an important source of revenue for British India and the Native States that administrators and rulers were reluctant to provide exemptions even though it was in the interests of trade. Equally of importance, any differences in the stamp law between British India and the Native States proved to be a major obstacle. By this stage, British Indian courts were used extensively to arbitrate disputes between Indian merchants, as well as to regulate the practice of hundi as detailed by the ISA. In this way, the ISA provided a stamp of validation to hundis, that was largely accepted by Indian merchants, particularly as merchants increasingly turned to the courts for settlements and disputes.

At the time of the ISA's creation, and soon thereafter, the British Indian administration did not intend to properly define hundis. The instrument's classification as a bill of exchange is almost cursory considering the paucity of additional description. An understanding of English bills of exchange was imported and applied to the matter of defining hundis. Even this small exertion at defining hundi, was the result of complex cases in which hundi definitions were found to be insufficient for the purpose of applying the law

in court. Officials and legal practitioners have subsequently noted that the ISA defined hundi as a bill of exchange, but a bill of exchange was not necessarily a hundi.

The government became conscious that a proper definition of hundi was beyond their understanding. Cast by its indigenous origins, yet evolving in response to legislation, hundi was an ambiguous entity. In attempting to rule on the matter of barati chittis in court, the government did endeavour to define hundi. It did so by ascribing particular characteristics to hundi, according to the government's perception of what the instrument was. However, this was found to be extremely tricky because hundi did not fit into distinct or uniform categories. Several government administrators readily admitted that because hundi was little understood, any definition within the ISA was likely to weaken rather than strengthen legislation

The NIA of 1881, was drawn on extensively in the courts, and within government proceedings on the ISA, but this provided a separate set of definitions. And ironically, though bills of exchange are defined, the NIA excluded hundi from its remit, reasoning that it was indigenous in character. It laid out that hundi would only come under the aegis of the NIA when customary rules were lacking. Yet, as we shall see in chapter five this was the Act which had the greatest influence on hundi in the courts.

Although tax evasion and fraud prevention were uppermost in administrators' minds, the process of legislating around hundi had the effect of bringing hundi practice more squarely into the domain of the British courts. The particular requirements of the ISA, though restrictive to hundi practice in some senses, nevertheless impressed upon hundi a character of authenticity and validity which cut across mercantile

communities. British Indian laws and the spaces in which they were enacted—the courts—created an independent adjudicator which may have ultimately promoted greater use of hundis. The impact of the courts on hundi disputes is examined in chapter five.

## **Chapter 5 Hundi In the Dock: The Influence and Practice of the Negotiable Instruments Act and British Indian Courts.**

There is a certain ‘trial and error’ character to the various Acts created by the British Indian government between 1858 and 1947. Ironically, whilst notions of “administrative tidiness”<sup>248</sup> may have framed much of the impetus for such acts, we saw in chapter three with the Indian Stamp Act (ISA) of 1879<sup>249</sup>, that they often resulted in confusion within the Indian mercantile community. On the other hand, this Act and the Indian Negotiable Instruments Act (NIA) of 1881 paved the way towards a kind of formalization of hundi according to British benchmarks.

As already seen, the inclusion of hundi within the ISA provides some sense of hundi’s validity and pervasiveness. Conversely, the exclusion of hundi from the NIA also emphasizes the indigenous origins of the system and the dichotomy between instruments still bound by indigenous customary practice and the interaction of British colonial laws. Yet, in many ways, the NIA arguably had the greatest impact on hundi. While the ISA ruled on authenticity and revenue issues, the NIA ruled on the particular elements which lent negotiability to an instrument. Issues of endorsement, presentment and liability were chief amongst these elements. In particular, the NIA grappled with articulating the nature and remit of hundi. In the courts, it was also decisive on the degree to which customary law, and the NIA respectively, influenced the manner in which mercantile disputes were

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<sup>248</sup> Bayly, *Rulers Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770-1870*. P.372.

<sup>249</sup> *Indian Stamp Act*, (February 1879).

resolved. Its approach left a lasting legacy which influenced the negotiability of the instrument in all future activity.

The overarching question of whether indigenous negotiable instruments should be included in the NIA continued to haunt future legislative and banking committees, right up until the 1970s. For this reason the NIA deserves greater attention, and its various dimensions have been broken down into two chapters. This chapter examines the impact of the courts and the NIA on hundi at its inception, through scrutiny of legislative documents and mercantile disputes. Court cases reveal that the NIA and the British Indian courts set precedents for perceiving hundi's negotiability in all future activity. This builds on the core themes of *definition*, *formalization*, and *persistence and change* which run throughout the thesis. In analyzing the NIA's legacy with respect to hundi in later years, chapter six also draws on such themes, with particular emphasis given to *formalization* and *persistence and change*. There are three parts to this chapter: the purpose of the NIA with respect to hundi; the form of the NIA in relation to hundi; the impact of the NIA by examining its practice in the courts. Here I assess the ways in which the courts and the application of the NIA reinforced and redefined hundi, specifically in terms of its negotiability.

### 5.1 Processes of Accommodation

Prior to the advent of the NIA, English Law on negotiable instruments was applied to European parties. Indians were governed by customary laws. For this reason two kinds of courts deserve particular clarification: the Sudderdewany Udalut courts (often abbreviated to Sudder Udalut<sup>250</sup>), and

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<sup>250</sup> Transliterated in a variety of ways, it was also spelt as Sudder Adawlut or Sadr Adalat.

the Judicial Committee of the Privy Council (referred to henceforth as Privy Council). Sudder Udalut courts were the chief courts of appeal present in the Calcutta, Madras and Bombay Presidencies. Though presided over by Europeans, these courts administered civil court judgements based on Hindu and Islamic law for native Indians only. The Supreme Courts in contrast, chiefly dispensed English and civil law. In 1862 the Sudder Udalut courts were however, merged with Supreme Courts to form the High Courts and were then used by Indians and Europeans alike. This kind of unification of the courts was part of the colonial government's overall aim to bring indigenous practices in conformity with English laws. Homogenization of this nature, also provided the guiding force behind the creation of the NIA. This legal context within which Indian merchants operated, is an area that has been given little attention. Legislation around the issue of hundi provides the means of understanding the dichotomy between Indian custom and the colonial legal architecture.

At the time of the NIA's conception, government administrators sought to determine and standardize the conditions within which credit instruments were negotiable. Although the Indian Stamp Act (ISA) of 1879 classed hundi as a bill of exchange, the Negotiable Instruments Act (NIA) of 1881, it could be argued, implicitly did not. Promissory notes, bills of exchange and cheques were all included as negotiable instruments within the Act. However, hundi was excluded from its provisions, unless customary law or local usage could not apply to its operations.

The conditional application of the NIA to hundi, represents a broader dialogue that the colonial government conducted with respect to the creation of laws. As we saw from chapter three, the government sought to bring significant economic transactions from the traditional domain into a



formalized central arena. According to legal practitioners, a *via media* approach was struck in relation to hundi by “saving local usages from the operation of the Act, and at the same time providing that such local usages may be excluded by any special provisions in the instrument.”<sup>251</sup> Citing from the Select Committee’s Report at the time, these legal commentators note the many issues surrounding the decision:

We have carefully considered the arguments urged on the one side by the learned Chief Justice of Bengal and the Bank of Bengal for the immediate application of the measure in its entirety to hundis and on the other side by the Government of the Punjab for the total exclusion of hundis from any part of the measure. We have come to the conclusion that the Bill should in this respect be left substantially as it stands. Admitting with the Chief Justice that the one main principle of Indian codification is to reconcile and assimilate, as far as possible, the Native and European law on each subject, we would point out that this principle must be applied so as to produce as little friction as possible, and we feel assured that any sudden abolition of the numerous local usages (there is no general custom) as to hundis, uncertain and undefined as they often are, would cause much and justifiable dissatisfaction amongst Native bankers and merchants in certain parts of the country. But we believe that the effect of the Bill, if passed with the saving of the local usages in question, will be not as the Chief Justice fears, to stereotype and perpetuate these usages, but to induce the Native mercantile community gradually to discard them for the corresponding rules contained in the Bill. The desirable uniformity of mercantile usage will thus be brought about without any risk of causing hardship to Native bankers and merchants. How long this change will take is of course impossible to prophesy. But the Bank of Bengal has supplied evidence that the Native usages as to negotiable paper have of recent years been greatly changing and that the tendency is to assimilate them more and more to European custom.”<sup>252</sup>

There are several important points here. First, that the principle of Indian codification was not merely to replace, but rather to knit together and incorporate indigenous laws with European laws, and with as little antagonism as possible. Second, that the long-term strategy of colonial administrators, was to standardize mercantile usage so as to correspond in

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<sup>251</sup> Krishnamachari Bhashyam, K. Y. Adiga, and India., *The Negotiable Instruments Act*, 6th ed. (Calcutta: Eastern Law House, 1935). P.18.

<sup>252</sup> *Gazette of India*, 1879, V. 75 Cited in *ibid.* PP 18-19.

all particulars with the NIA rules. (We shall see how well this worked with hundi in the discussion around court cases later on. )

Legislative debate on the function of notaries public within the NIA, occupied the minds of public and judicial figures who discussed whether to amend the 1881 Act. One topic centred on whether a person paying a bill of exchange 'for honour' needed to go through specific formalities before a notary. In response to legislative enquiry on the subject in 1884, the Rangoon Chamber of Commerce felt that these formalities before a notary were redundant:

I am directed to inform you that, in the opinion of the Chamber, there is no valid reason why a person paying a bill for honour should have to go through certain formalities in the presence of a notary. It would be better, the Chamber thinks, to dispense with these formalities in the case of a person paying for honour, as is done in the case of a person accepting for honour.<sup>253</sup>

However, the Officiating Secretary to the Chief Commissioner of British Burma felt that it would be "safer to adhere in this matter" to the English practice, especially as the Rangoon Chamber of Commerce had not, in their opinion, given any reason for departing from the English practice.<sup>254</sup> What is clear from these divergent viewpoints, is that the Indian merchant institutions were unenthusiastic about embracing more formalities, because these were seen as overly prescriptive. The British government officials were nevertheless, unconcerned with whether merchants found measures

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<sup>253</sup> "Papers Relative to the Bill to Amend the Negotiable Instruments Act. From Secretary to Chamber of Commerce, Rangoon, to Officiating Secretary to Chief Commissioner, British Burma," in *India Office Records, Legislative Department, Public and Judicial Branch*, 6/132 File 1524 (26th June, 1884).

<sup>254</sup> "Papers Relative to the Bill to Amend the Negotiable Instruments Act. From Officiating Secretary to Chief Commissioner, British Burma, to Secretary to Government of India, Legislative Department," in *India Office Records, Legislative Department, Public and Judicial Branch*, 6/132 File 1524 (4th July, 1884).

inconvenient; it was more important that Indian law followed English law more faithfully.

There was a general sense in government that it was of practical convenience to make laws more uniform with respect to bills. One government official's views encapsulated this perspective:

....It might make for mercantile convenience to have one law expressed in the same terms for the whole of the Queen's dominions... It certainly is convenient in some ways that instruments like bills of exchange which circulate freely from one country to another should not alter their laws as they go. It is convenient that a bill drawn in England on Australia, or a bill drawn in India on England should be governed by the same law, both when it is drawn and where it is acceptable and payable...<sup>255</sup>

Nevertheless, there was a disjunction between English theory and actual practice amongst Indian merchants. When officials in the Punjab were broached on the subject of paying a bill for honour before a notary, they indicated its acceptability in terms of procedure, but its character of being alien to Indian merchants in the region.

From the replies received, it appears that the Bill is accepted on all hands as effecting a suitable and unobjectionable amendment in the law regarding the procedure attending an acceptance for honour. It is, however, remarked by the Deputy Commissioner and Commissioner of Lahore that such an acceptance is almost unknown among native bankers in that part of the Punjab.<sup>256</sup>

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<sup>255</sup> "Extract from the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Indian Councils Acts, 1861 and 1892," in *India Office Records, Legislative Department, Public and Judicial Branch*, 6/442 File 592.

<sup>256</sup> "Papers Relative to the Bill to Amend the Negotiable Instruments Act. From E.B. Francis, Esquire, OPFG. Junior Secretary to the Financial Commissioner, Punjab, to - the Under - Secretary to Government, Punjab,," in *India Office Records, Legislative Department, Public and Judicial Branch*, 6/133 File 1633.

To what extent did the NIA itself reflect indigenous practice? Certainly, English Law was brought to influence the direction of the NIA. By some accounts the Act hardly deviated from English mercantile law.<sup>257</sup> Founded on mercantile principles of utility, it was based on customs of trade and principles of equitable usage which grew over time in England and other parts of the world.<sup>258</sup> Nevertheless, the process of absorbing indigenous practice, in itself shaped the NIA. To this extent, the NIA was not a replica of English law. This is more clearly seen in the case of hundi. When hundi was brought to court, English law was not merely applied in a blanket sense. Decisions which were brought to bear on hundi cases, were arrived at through a combination of drawing on English laws and Indian customs. It is this dual influence essentially, which characterized the Negotiable Instruments Act.

Given that customs could vary so greatly, the government's comprehension of hundi was invariably limited. While customs varied, the nature of the instruments also changed, at times serving as a bill of exchange, at others like a promissory note. Qualitative differences like this and the mutability of hundi had already caused problems with Stamp Act regulation (see chapter 3 for details). Consequently, before the passing of the Act, it was held that the NIA should only apply where proof of customary practice was absent.

In essence, hundi's status espoused Lauren Benton's thesis that a process of accommodation between colonial and local courts took place. On the one

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<sup>257</sup> Arthur Caspersz, *The law Relating to Negotiable Instruments in British India*, 2nd ed. (Calcutta: Thacker, Spink & Co., 1897). P.1.

<sup>258</sup> Chiranjiva Lal Agarwal, *The Law of Hundis and Negotiable Instruments*, Third ed. (Lahore: University Book Agency, 1936). P.11.

hand, the court cases exemplify that the British tried to bring their perception of order into being. On the other hand, the process of accommodation with indigenous entities such as hundi, suggests a relatively pliable environment. This pliability is perhaps best seen in legislative debates and the court cases which follow. Here there is some indication of how the courts mattered in the development of the colonial state. Benton points out that the courts initially were “a space for British jurisdiction over British subjects.”<sup>259</sup> In later years, when the courts administered to both British and Indian subjects alike, they represented a forum for British jurisdiction over both British and Indian subjects.

Hundi’s relationship with the NIA remained ambivalent in some respects, just as Indian merchants’ connection with British Indian courts was rather ambiguous. In principle, hundi customs were recognized by the courts if they were “proved to be certain, invariable, reasonable and so notorious that everybody in the trade enters into a contract with that usage as an implied term.”<sup>260</sup> In practice, the primary method by which customs came to be known by the government, was through arbitration in the courts of law. Occasions for the application of the NIA thus arose primarily in court, where merchants sought to enforce hundi.

Dissenting voices over how to best treat indigenous practices with the NIA also illustrate the ambivalence of hundi’s relationship with the Act. Some government administrators felt that accommodation ought not to be effected

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<sup>259</sup> Lauren A. Benton, *Law and Colonial Cultures : Legal Regimes in World History, 1400-1900*, Studies in comparative world history (New York: Cambridge University Press, 2001). P. 132.

<sup>260</sup> Bhashyam, Adiga, and India., *The Negotiable Instruments Act*. P. 19.

for Indian practices, because it would merely impose stress on the fabric of the Act.

And then comes the question whether this process of assimilation ought to be carried further. If we go on amending the Indian Act in detail after detail it will become an almost intolerable patch-work. But there is an alternative course which might be taken, and that would be to adopt, once and for all, the English Act, of course applying it only to what may be called English instruments and making the necessary saving for hundis and for one or two peculiarities of Indian law.... I suggest for consideration whether it might not be convenient to have once and for all, the English Act.<sup>261</sup>

However, there were particular problems in adopting English banking practice. One legislative debate centred on whether a 'bearer' cheque or hundi could become an 'order' instrument through endorsement. In functional terms, the difference between the two was that a bearer hundi or cheque was transferable or negotiable by mere delivery, while an order hundi or cheque could only be transferred or negotiated by the person to whom the instrument was specifically endorsed.

## 5.2 Hundi in the Courts

The ambivalence of hundi's relationship with the NIA, and the ambiguity of Indian merchants' position with respect to the courts, raises a number of questions. How did Indian merchants view the NIA? There are indications

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<sup>261</sup> "Papers Relative to the Bill to Amend the Negotiable Instruments Act. From A.P. MacDonell, Esq., Secretary to the Government of Bengal, Revenue Department, Darjeeling, to the Secretary to the Government of India, Legislative Department.," in *India Office Records, Legislative Department, Public and Judicial Branch*, 6/134, File 1764 (3rd July, 1884). P.2.

that some Indian merchants regarded the Act as “useless”,<sup>262</sup> and an inconvenience for merchants.<sup>263</sup>

Why then were hundi cases brought to court? Were these cases a marker for instances where Indian merchants sought reinforcement of customary practice? Or indeed, were there instances where Indian merchants found the rules of customary usage wanting in some way? We may also ask whether the NIA encouraged greater litigiousness? If so, what was it about the NIA that persuaded Indian merchants to bring their suits to court? Were the courts capable of reinforcing hundi in a more effective way than customary sanctions? This is a contentious issue, and to assert this would mean arguing that customary practice was in itself less binding, or weaker at governing hundi practice. Were rights redrawn with respect to hundi in the courts, and to what extent? What happened to hundi when rights were redrawn? What implications did this have for Indian merchants on an institutional basis, and also for hundi's status within the courts?

First, let us look at how customary usage and sanctions may have influenced hundi practice. One key concern of colonial legislators was that customary usage was so multifarious, differing from community to community. Hundi could thus take on several guises. Legal practitioners felt that these multifarious customs could have the effect of annexing terms to a trade

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<sup>262</sup> "Papers Related to the Bill to Amend the Negotiable Instruments Act. From Secretary to Chief Commissioner, Assam to Secretary to Government of India, Home Department, No. 191.," in *India Office: Public and Judicial Department Records 6/125, File 930* (1883).

<sup>263</sup> IOR/L/PJ/6/121 File 620.

contract which were consistent with them, and which might also influence the interpretation of a contract.<sup>264</sup>

How did the government decide on what were valid customs? We have seen previously that , hundi customs were recognized by the courts if they were proved to be amongst other things, 'reasonable'. The legal profession seems to have had a somewhat scathing view of merchant customs as revealed by the 1908 Tagore Professor of Law's perception of such conventions:

Customs of trade, as distinguished from other customs, are generally courses of business invented or relied upon in order to modify or evade some application which has been laid down by the courts, of some rule of law to business and which applications have seemed irksome to some merchants. And when some such course of business is proved to exist in fact, and the binding effect of it is disputed, the question of law seems to be, whether it is in accordance with fundamental principles of right and wrong.<sup>265</sup>

In practice, the colonial administration's interpretation of what was 'reasonable' was influenced by its own notions of 'right' and 'wrong'. But on what premise were these principles of right and wrong grounded? Did these principles of justice conflict with merchants' own sense of rights?

At times it would seem that the courts served as an arena for mediation where customs couldnot provide guidance on the primacy of different agreements. In the absence of fraud, or some other obvious wrong doing, the problem with multiple customs precisely presented the difficulty of deciding which agreement should take precedence. Custom-based contracts would appear to have been more fluid in character, enforcement shifting in relation

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<sup>264</sup> Sripati Charan Roy, *Customs and Customary Law in British India*, Tagore law lectures ; 1908 (Calcutta: Hare Press, 1911). P. 533.

<sup>265</sup> Ibid. P. 534.



to perceived risk. Thus, bankruptcy could easily dissolve original agreements, as seen in chapter three. In contrast, the British India courts enforced contracts as far as possible, irrespective of perceived risk. They followed the principle that the nature of the original contract should in some way remain as true as possible to its essence. In other words, the integrity of the contract, if undertaken in legitimate circumstances, should be enforced. It is perhaps for this reason that Indian merchants did bring hundi suits to the British Indian courts

### 5.3 Bankruptcy and Competing Claims

In the appealed case of *C.M.A Narayana Iyer Adimulum Iyer v. Lekshmana Iyen Kulathur Iyen* in 1915,<sup>266</sup> two separate agreements came into conflict because the party which featured in both transactions became bankrupt. The facts of the original case follow. Most likely to avoid confusion defendants were numbered rather than named in the court report. Prior to its bankruptcy, the family firm of Ku. Ru. Ma. Cha conducted a hundi trade at Trivandrum and Kalladakkurichi. Defendants 2 to 4 in the case were members of the undivided Hindu family which owned the firm that conducted business with the plaintiff's shop at Cochin. Since money was owed to the plaintiff, the 4<sup>th</sup> defendant drew a hundi for Rs 1,000 on the 1<sup>st</sup> defendant, who was another trader in Trivandrum. This hundi was made payable to the plaintiff's agent. In turn, the plaintiff's agent endorsed the hundi to a person named Kasin in order to collect the stated sum. The 1<sup>st</sup> defendant accepted the hundi on presentation, and provided a written statement on the back of the hundi agreeing to pay the instrument's value on a specific date. However, the 1<sup>st</sup> defendant failed to make payment on the

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<sup>266</sup> *C.M.A. Narayana Iyer Adimulam Iyer v. Lekshmana Iyen Kulathur Iyen and others*, 1915, The Travancore Law Journal, Vol VI.(1916).

hundi even after the date had passed. In this instance, Kasin returned the hundi to the plaintiff, who initiated a suit for recovery of Rs 1,000 and interest at 12 per cent from the date on which the hundi was due for payment.

Complicating matters in what might otherwise have been a straightforward breach of contract, the 1<sup>st</sup> defendant stated that there were several compelling reasons for his non-payment. The first reason was custom-based, as the 1<sup>st</sup> defendant claimed that he “did not get the usual letter from defendants 2 to 4 directing him to pay the money”; this letter is later referred to as ‘Melazhuthu’. The second reason he gave related to a breach of conduct (rather than contract) on the part of the 2<sup>nd</sup> and 4<sup>th</sup> defendants, and the perception of risk as he learnt that they had not credited the sum specified in their account held with him, and furthermore, their firm had failed. The most compelling reason he provided was that the plaint Hundi was fraudulent, and that he had received an attachment notice (a legal order taking possession of all funds belonging to defendants 2 to 4 remaining with the 1<sup>st</sup> defendant), which prohibited him from paying any money to the plaintiff. Finally, in relation to this, the 1<sup>st</sup> defendant had received notice from other creditors of defendants 2 to 4, stating that he should not pay the sum. In this way, the 1<sup>st</sup> defendant, claimed this he was not liable for costs and interests.

However, the plaintiff had initiated a suit, not against the 1<sup>st</sup> defendant, but against the 5<sup>th</sup> defendant; this defendant was the one responsible for the attachment order on the money of defendants 2 to 4. The 5<sup>th</sup> defendant was a creditor of the firm of Ku. Ru. Ma. Cha, and was also a plaintiff in another suit against this firm in order to recover his funds. He claimed that the hundi in question was antedated after defendants 2 to 4 became bankrupt in order

to fraudulently prevent him from taking ownership of his money. He also argued that the plaintiff did not have the right to bring this suit to court because the hundi had been endorsed to Kasin. Moreover, the credibility of the hundi was in doubt because it had been drawn by the 4<sup>th</sup> defendant only, where by rights he could not solely and legitimately execute a hundi on behalf of the firm. (See Table 5.1: C.M.A. Narayana Iyer Adimulam Iyer *v.* Lekshmana Iyen Kulathur Iyen and others.)

Thus, we see that for the appeal court, the case raised the question: which claim on defendants 2 to 4's money had priority? The lower court (Trivandrum Temporary Munsiff's Court) had already found in favour of the original plaintiff, based on findings which established the following: the validity of the hundi – that it had been executed prior to the firm's bankruptcy; the liability of the 1<sup>st</sup> defendant in respect to the hundi - that the absence of Melazhuthu was secondary to the 1<sup>st</sup> defendant's formal acceptance of the hundi, and that the firm's bankruptcy did not undo this contractual liability; and finally, that the plaintiff was eligible to maintain the suit – that the endorsement to Kasin had been for collection only, and was not therefore a transfer of ownership.

**Table 5.1 C.M.A. Narayana Iyer Adimulam Iyer v. Lekshmana Iyer Kulathur Iyer and others**

<b>Mechanics of operation and terminology</b>	<b>Person A Who made the order</b>	<b>Person B Who received the order</b>	<b>Person C Who benefited by the order</b>	<b>Person D Who benefited by the order</b>
	The person who draws the instrument, or makes an order, and the person who originally endorsed the instrument	The person who is expected to pay an instrument when it is presented for payment. In other words, the person on whom the hundi is drawn	The person to whom the instrument is payable, and who now owns the instrument. This person may sell the instrument or transfer it by endorsing to another	The person to whom the ownership of the instrument is transferred by endorsement, and to whom it is therefore payable
	Endorser Drawer	Drawee Acceptor	Payee Holder Bearer Fresh Endorser Seller Transferor	Endorsee Holder Bearer
	Hundi drawn by A	Upon B	In favour of C	In favour of D
<b>Persons in case</b>	Defendants 2 and 4, of firm Ku. Ra. Ma. Cha. In Trivandrum and Kulladakkur ichi	1 <sup>st</sup> defendant, trader in Trivandrum	Plaintiff, with shop in Cochin	Kasin, for collection only

The appellant threw two of the lower court's findings into contention: the issue of re-indorsement, and the time at which the hundi was drawn. The appeal court agreed with the lower court's judgement that there was little evidence to support either of these two claims. The third argument put forward by the appellant, cast doubt on the legitimacy of the 4<sup>th</sup> defendant alone executing a hundi on behalf of the firm. Here, in the absence of evidence to support the appellant's contention, the court turned to the Bill's of Exchange Act to establish validity. It concluded that the 4<sup>th</sup> defendant was effectively the equivalent of a partner in a trading firm, and thus had the authority to draw the hundi for the firm's purpose.

Judgements reached in both the lower and appeal court, follow a particular logic. At their heart, in contrast to custom-based practices, these judgments are framed by the weight of evidence in support of any claim. Furthermore, in this case, we see an illustration of the way in which the courts set aside customary practice, in this instance: Melazhuthu, in favour of maintaining the integrity of the 1<sup>st</sup> defendant's contractual obligations with respect to the hundi instrument. This action on the part of the courts, had the effect of sharpening the importance of written hundi acceptance, elevating its significance above any other considerations. Risk, insolvency and competing demands on the money by other parties were all treated as secondary by the courts relative to upholding the soundness of the hundi transaction. For the government, this principle was important for preserving the negotiability of hundi instruments. And this kind of approach must ultimately have lent greater weight to the matter of written hundi agreements, regardless of subsequent adverse circumstances.

#### 5.4 Discharge of Debt

While the previous case revealed the significance placed by the courts on retaining hundi's contractual integrity, there were other instances in which they sought to sharpen the function of hundi. The case of *Mudaliar v. Chettiar*<sup>267</sup> demonstrates the problems inherent in using a negotiable instrument such as hundi as a means of discharging a debt. While it was wholly permissible to use a hundi as a means of discharging debt according to customary practice, this kind of fluid character presented problems in the courts. In this forum, to resolve the dispute centreing on a hundi transaction, the court needed to establish the precise conditions within which the hundi was drawn and accepted, and the overarching purpose of the hundi: whether it was to provide collateral security, complete discharge of the debt, or partial satisfaction of the debt. In each of these circumstances, the implications for the defendant and plaintiff would be very different. Thus the case also refines the nature of other agreements in relation to hundi.

Also in relation to the plaint hundi, the courts were driven to verify whether something alleged as a customary practice, was indeed so. And if so, what the probable impact of its absence might be. Significantly, a section of the NIA is used by the plaintiff to support his position, and this proves persuasive.

The suit was for recovery of Rs 1029 annas 11 pies 9 because of the principal and interest due on a pattuvaravu (or income) account. This account was held by the 1<sup>st</sup> defendant (sole in the original case) in the plaintiffs Hundi shop. The 1<sup>st</sup> defendant claimed that he was not personally responsible for dealings with the plaintiffs' shop. He argued that the business conducted

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<sup>267</sup> *Subramonia Mudaliar Chitraputra Mudaliar and another v. Bhagavathi Perumal Chidambarathanu Chettiar and 2 others*, The Travancore Law Times(1925).

was through an unregistered partnership consisting of himself and others under the aegis of the 'Town Motor Company'. The other partners of the company were impleaded as defendants 3 to 22, with the company itself put on the record as the 2<sup>nd</sup> defendant.

The 1<sup>st</sup> defendant claimed he had drawn a hundi for Rs 500 on a hundi firm at Tinnevely on 9/10/1918, and asserted that the account should have been credited with the amount of the hundi. He also disputed the amount of interest that was said to have been agreed upon. The court questioned the accuracy of the amount sought for recovery by the plaintiff, and the defendant alleged that he was not liable for that amount from any perspective.

In the original case, the Munsiff<sup>268</sup> determined that the 1<sup>st</sup> defendant was entitled to receive credit for the hundi's amount. The Munsiff had decided that the plaintiff had failed to give notice of dishonour, as per merchant custom, to the defendant within the right time frame. In this event, it fell to the court to decide whether the defendant had consequently sustained damages. The court decided he had, and held that the defendant should receive credit for the amount of the hundi. Consequently, the munsiff decreed that the plaintiff should receive Rs 353 anna 1 and pies 10 against the 1<sup>st</sup> defendant, as well as interest at 12 per cent per annum up to the date of the decree as long as the total amount did not exceed half of the principal. Beyond this, interest was allowed at 6 per cent per annum. The lower court also ordered the plaintiff and the 1<sup>st</sup> defendant to pay costs. The 1<sup>st</sup> defendant was also instructed to pay the costs of the other contesting

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<sup>268</sup> The District Munsiff Court is the court of the lowest order, dealing with Civil matters. In this case, the Munsiff refers to the magistrate from this court.

defendants. (See Table 5.2: Subramonia Mudaliar Chitraputra Mudaliar and another *v.* Bhagavathi Perumal Chidambarathanu Chettiar and 2 others.)

The lower court judgement resulted in both the plaintiff and the 1<sup>st</sup> defendant filing two separate appeal suits. In his suit, the defendant argued that he was not personally liable for the admitted pattuvaravu dealings because these were carried out through the partnership of the unregistered: Town Motor Company. The defendant pleaded that his dealings with the plaintiff were purely in his capacity as the Director of the Motor Company.

In turn, the plaintiff's suit contended that the full amount which he had claimed was due on the pattuvaravu account should have been awarded. With respect to the hundi for Rs 500, the plaintiff reasoned that he had received the hundi towards discharge of the debt. However the hundi was only to be treated as doing so if it had been honoured on presentation. Again, the plaintiff maintained that notice of dishonour had been given orally and also by returning the hundi. And finally, the plaintiff pleaded that giving notice of dishonour was not essential, according to custom practiced by merchants in the locality.

On these points the Appeal court determined that the defendant could not reasonably claim he was not liable for the partnership debts. Even if his capacity as Director of the Motor Company were accepted as true, the court did not feel that this could somehow exempt the defendant from personal liability. All of these points considered, the Appeal court decided to dismiss the defendant's suit.



**Table 5.2 Subramonia Mudaliar Chitraputra Mudaliar and another v. Bhagavathi Perumal Chidambarathanu Chettiar and 2 others.**

<b>Mechanics of operation</b>	<b>Person A Who made the order Drawer</b>	<b>Person B Who received the order Drawee</b>	<b>Person C Who benefited by the order Payee</b>
Persons in case	Rengiah Chetti	Hundi firm at Tinnevely	Plaintiff owning Hundi shop running a pattuvaravu account for the defendant

With respect to the plaintiff's suit, the Appellate Civil court considered the following issues. First, the court felt that the Munsiff's earlier judgement in favour of the plaintiff, because of the conditions placed upon receiving it, did not appear correct. Could one contract – in this case the debt – be discharged through another similar executory contract, such as the hundi? If so, should this not be based on a new consideration, or be conditioned to provide legal recourse if the contract were breached? Drawing on the precedent set by another case, the court argued that if no such new consideration or legal recourse were inherent in the new contract, the hundi would merely substitute one cause of action for another. Moreover, if a valid bill or note were received for even smaller a sum than demanded, in satisfaction of the debt, then the creditor would simply have postponed resolving the debt. And if the creditor received the money from the

instrument or was negligent in doing so, the instrument would function as complete satisfaction.

The court then reasoned over how to decide whether a bill was taken in full satisfaction of the debt or just conditional payment. Once again, by drawing on English case history, the court determined that the hundi must be presumed as being in favour of conditional payment. This is because any bill taken in complete discharge of a debt, would effectively amount to a situation known in English Law as 'accord and satisfaction'. However, in that event, the plaintiff could not allege dishonour of the instrument. And if a bill were accepted in lieu of or for and on account of the debt, then the defence of accord and satisfaction could not apply, because the original debt would still be unmet. Interestingly, the defendant's Vakil (lawyer) offered a rebuttal to this argument by citing another case. However, this case was deemed by both the lower court and the Appeal court as unhelpful; it was felt that this cited case was about a letter of credit, and therefore had a very different premise to the bill of exchange, which the court obviously thought was the best approximation for the hundi.

The second important issue, was the customary practice of providing notice of dishonour, and the legal effect of its absence. If the defendant did not sustain any damages through the absence of notice, then irrespective of custom, the lack of notice was not important. The appellant was able to convince the court that the defendant had not been materially damaged through lack of notice. He was able to do so by drawing on the provisions of a clause belonging to a particular section of the NIA. The plaintiff had filed a replication which laid out the facts of the hundi's presentation and dishonour almost one month before the original court case resolution was

reached. This certification process served as a protest before a notary public as directed by section 100 of the NIA.

When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public.<sup>269</sup>

The evidence put forward in support of the plaintiff's position focused on illustrating that the settlement of accounts (as shown by a court Exhibit IV) between the defendant and the Directors of the Motor Company took place a few months after the plaintiff had filed his replication of the hundi's presentation and dishonour. However, the defendant claimed ignorance of the plaintiff's plea. Inserted as one of the party executants in Exhibit IV was the defendant's name, but his signature was not on the document. As a result, the defendant maintained that that he was unaware of the settlement transaction between Rengiah Chetti and the Directors of the Motor Company. The court, however, felt that this was implausible and disregarded the defendant's plea.

In addition, the settlement of accounts did not reflect the amount of the hundi. Why was it left out? The court presumed that the hundi was either treated as honoured or was excluded because it had been dishonoured. On being questioned point blank, the defendant was unable to concretely say whether the hundi had been included in the settlement of accounts as evidenced by Exhibit IV. Consequently, the court concluded that the defendant and other directors of the Motor Company knew of the hundi's dishonour at the time the settlement of accounts was drawn up. In this way,

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<sup>269</sup>. Bhashyam, Adiga, and India., *The Negotiable Instruments Act*.

the court established that the defendant had not been materially damaged by the absence of the notice of dishonour. The court thus ordered the defendant and company directors, to make full payment of the debt plus interest, and costs from both courts to the plaintiff.

In this case, we see a clear instance of the way in which the courts sought to both establish the validity of customary practice, and to determine whether its function was critical to the agreements between agents, and the integrity of the hundi contract. A pragmatic approach is evident in the way in which the court assessed how useful the customary notification of dishonour actually was in this case. While the courts were circumspect about establishing and drawing on mercantile customary practice, they did not do so blindly. It was more important to the courts to ascertain the relative weight of different practices and the normative implications of the presence and absence of such practices.

At one and the same time, the case provides an illustration of how one party—the defendant—relied on the custom of ‘notice of dishonour’, whilst the other party—the plaintiff—contested its validity. Perhaps more significantly, the plaintiff chose to use the conditions laid out in the NIA to better bind the contractual nature of the dishonoured hundi. Why did he choose to do this? Is this an indication that the provisions of the NIA had begun to acquire greater weight with respect to hundi? Certainly, the case would appear to signal this, but there is insufficient evidence to know if other merchants adopted a similar approach.

There were other practical considerations that the court adopted with respect to hundi. The case highlights how the fluid character of hundi transactions as per customary practice, could pose problems in terms of

determining its function and relationship with other kinds of agreements. It is for this reason that the court spends a significant portion of its judgement towards discussing the implications of using one kind of contract -- in this case the hundi -- as a means of conditionally or unconditionally discharging another contract. And once the relationship of the hundi contract to the original debt is verified, the court is then able to weigh up the validity of the hundi, and the liability of parties, in conjunction with the evidence provided by these other agreements. In other words, hundi was not viewed as an isolated contract, but rather one to be judged according to individual contexts, and with respect to other contingent agreements.

Did customary practice afford this level of reasoning? This seems unlikely, and once again, we may ask whether this is at least partly the reason why Indian merchants brought hundi disputes to the courts. What role did the NIA serve in this case? Ultimately it promoted a codified form of conduct that was more formalized than customary practice. We may ask how different the customary notice of dishonour was to the formal protest of dishonour when certified by a notary public. While the former practice required tacit recognition by both parties in a given locality, the provisions of the NIA bore the legal stamp of recognition, material to all parties, in all locations. When the plaintiff applied the NIA's provisions to the dishonoured hundi, he was imprinting a formalized process on the character of the hundi, and it was this the court recognized.

### **5.5 Question of Jurisdiction**

The courts also formalized hundi transactions by creating sharper lines of jurisdiction between parties as in the case of *Seweram Gokaldas v.*

Bajrangdat Hardwar.<sup>270</sup> Here the defendant who was conducting business at Bassum in Akola, had dealings with the plaintiffs who carried on business in Bombay. An account was created between the two parties and settled at Bassum with two hundis. These hundis were for the value of Rs 900 and Rs 1,000 respectively, and were drawn by the defendant on his own firm in favour of the plaintiffs. After the defendant dishonoured the hundis on the due dates, the plaintiffs filed a suit in the High Court to recover the value of the hundis. However, the defendant claimed that the Court had no jurisdiction to maintain the suit, given that the money was not payable in Bombay. The plaintiffs argued that the balance of the account due by the defendant to the plaintiffs with respect to transactions conducted in Bombay, formed the 'consideration' of the hundis. Thus, they contended that the money was, in virtual terms, payable in Bombay, especially since the significant elements of the cause of action arose in Bombay.

The court however decided that the material part of the cause of action were the hundis, which were themselves payable in Bombay. It therefore held that the court had no jurisdiction to conduct the suit. Another part of the judgement concerned the obligation of any merchant conducting business outside the remit of his own location, to ensure that any hundi accepted in satisfaction of his account, was made payable in his home location. (See Table 5.3: *Sewaram Gokaldas v. Bajrangdat Hardwar*.)

The courts had the impact of formalizing and enforcing specific jurisdictions within which transactions were conducted. In this way, the courts served not

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<sup>270</sup> *Sewaram Gokaldas v. Bajrangdat Hardwar*, Digest of Indian Law Cases Containing High Court Reports, and Privy Council Reports of Appeals from India, 1910-1921, Vol. I. Case cited from I.L.R. 40 Bom. 473(1916).

merely as arbitrators of disputes but also created more firmly drawn parameters for hundi business.

**Table 5.3** *Sewaram Gokaldas v. Bajrangdat Hardwar*

<b>Mechanics of operation</b>	<b>Person A Who made the order Drawer</b>	<b>Person B Who received the order Drawee</b>	<b>Person C Who benefited by the order Payee</b>
<b>Persons in case</b>	Defendant carrying on business at Bassum in Akola, for two hundis.	Defendant (again)	Plaintiffs carrying on business in Bombay

**Table 5.4** *Sadasuk Janki Das v. Sir Kishan Pershad.*

<b>Mechanics of operation</b>	<b>Person A Who made the order Drawer</b>	<b>Person B Who received the order Drawee</b>	<b>Person C Who benefited by the order Payee</b>
<b>Persons in case</b>	2 <sup>nd</sup> defendant	Signatory of individual on behalf of 1 <sup>st</sup> defendant	--



## 5.6 Full Disclosure of Principal

The NIA had the effect of formalizing the method by which a hundi disclosed the person or firm serving as drawee. In the case of *Sadusak Janki Das v. Sir Kishan Pershad*,<sup>271</sup> the hundi sued on did not clearly state that the first defendant was a principal, thus the second defendant and drawer of the hundis, was held to be solely liable. The court obtained its ruling by using sections 26, 27 and 28 of the NIA and section 23 of the Bill of Exchange Act, 1882. In the case, the court clearly articulated perceived shortcomings of customary practices which consisted of one party dealing with other undisclosed parties. The court was keen to establish beyond doubt, liable parties in any given transaction. It sought to encourage transparency in order to discourage fraud. Here, even if the 1<sup>st</sup> defendant was truly liable, the non-disclosure of this fact on the instrument, could, in other circumstances, lead to fraudulent claims on innocent parties.

This action thus formalized the practice of making the transacting parties to a hundi contract, clear and unmistakeable. We learn from this case that the 2<sup>nd</sup> defendant had disclosed the 1<sup>st</sup> defendant's name, but in such a way that could not necessarily lead to "fair interpretation". (See Table 5.4: *Sadasuk Janki Das v. Sir Kishan Pershad*.)

## 5.7 Hundi Shah Jog

In some cases, the courts upheld customary rules in all its particulars. This appears to have been so when the customary practice articulated its

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<sup>271</sup> *Sadusak Janki Das v. Sir Kishan Pershad*, Digest of Indian Law Cases Containing High Court Reports, and Privy Council Reports of Appeals from India, 1910-1921, Vol. I. Case cited from I.L.R. 46 Calc. 663 (1918).

processes well enough so that safeguards were sufficient and unambiguous. The *Shah Jog* hundi was an instrument that was only payable to a respectable banker or financier, or person of repute within the bazaar; this person was known as a 'shah'. Given that this kind of hundi was only payable to a shah, the risk of dishonour was potentially less than many other kinds of hundis.

**Table 5.5 R. D. Sethna v. Jwalaprasad Gayaprasad**

<b>Mechanics of operation</b>	<b>Person A Who made the order Drawer</b>	<b>Person B Who received the order Drawee</b>	<b>Person C Who benefited by the order Payee</b>
<b>Persons in case</b>	R from Harpalpur	Plaintiff	M

However, in the case of *R. D. Sethna v. Jwalaprasad Gayaprasad*,<sup>272</sup> the drawee of the hundi, became the subject of fraud. The drawee who was also the plaintiff of the case, had been presented with a hundi for Rs. 3,000 by the defendants. The hundi was alleged to be drawn by person *R* in favour of *M* on the plaintiff payable at sight to a Shah. However the plaintiff initially refused to make payment of the sum under the hundi because he received no notification on the hundi itself. The following day, the plaintiff received a letter claiming to be written by *R* from Harpalpur. Enclosed within the letter was a railway receipt for 300 bags of linseed. These bags were stated to have been consigned by *R* from Ranipur Station, and the letter further requested

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<sup>272</sup> *R. D. Sethna v. Jwalaprasad Gayaprasad*, Digest of Indian Law Cases Containing High Court Reports, and Privy Council Reports of Appeals from India, 1910-1921, Vol. I. Case cited from I.L.R. 39 Bom. 513(1914).

the plaintiff to sell the goods, and to accept and pay on presentation, two hundis each for Rs. 3,000, payable at sight to a Shah, and drawn by *R* in favour of *M* on the plaintiff. (See Table 5.5: *R. D. Sethna v. Jwalaprasad Gayaprasad*.)

Thus instructed, the plaintiff passed on the railway receipt to person *K* on the very same day, and received payment of Rs. 5,600. Rs.3,000, together with one day's interest was then paid to the defendants for the hundi which had been presented the previous day. *K* returned the receipt to the plaintiff and was repaid Rs. 5,600 when the goods failed to arrive. On further enquiry it transpired that person *R* never existed, and both the hundi and railway receipt were forgeries. The suit brought by the plaintiff was premised on a custom which existed amongst Marwari merchants. Such custom dictated that if a Shah Jog hundi turned out to be false, fraudulent, stolen or forged, the Shah who had received payment, was obliged to refund the hundi's amount with interest. If however, the hundi were "traced to its source", i.e., the actual drawer or perpetrator of fraud discovered, then a refund was not necessary.

Following the Marwari Association Rules, the court did not find in favour of the plaintiff for three reasons. First, the defendants had been paid as endorsees of the hundi and not as Shah; second, any liability accorded to the defendants could only be valid if the plaintiff had communicated the discovery of forgery to them within "reasonable time" – presumably the enquiries had taken some time; third, the court deemed that the hundi had already been "traced to its source" as per the meaning of the Marwari Association Rules, before the defendants acquired information of the forgery.

Why did the court choose to adhere so strictly to the particulars of customary practice in this instance? Was it not unjust for the plaintiff who ultimately became the victim of fraud? It would appear that the court's priority was to enforce customary rules, where articulated, as far as possible. In this instance, the plaintiff had taken the railway receipts as collateral, and had rather incautiously made payment without any knowledge of the fictitious *R*. For the courts, this must have appeared reckless. Moreover, pinning liability on the defendants would have entailed establishing the defendants' knowledge and complicity of the forgery, and presumably there was little or no evidence of this kind.

These seem to be the essentials of the court's practical reasons for finding judgement against the plaintiff. However, it is perhaps also the case that this particular customary practice had greater weight because it was based on a particular indigenous mercantile institution, with a codified list of rules. It is probable that the court may not have felt it politically appropriate to propose any divergent premise for the judgement.

What impact did this have on hundi? Rights were not redrawn. Thus, this case provides a classic illustration of the way in which hundi's indigenous or customary rules persisted, and were even formalized in court. This example also appears to demonstrate that at times customary practice, which had institutional foundations—in this case the Marwari Association—strengthened customary practices in the courts. In turn, customary hundi practice was at times reinforced in the courts, thereby making hundi-related customs more binding. It is also clear that with dissenting voices arising from customary rules, the courts had the authority to liberally or strictly interpret such rules, as they saw fit.

## 5.8 Conclusion

The NIA's position towards hundi is significant because it illustrates a core dynamic in relation to indigenous practices. The Act's specific conditions with respect to hundi, should, in great part, be viewed as a process of accommodation rather than mere exclusion. This process of accommodation was part of a long term strategy to eventually assimilate Indian customary practices into European rules and conventions. In the short term, the government sought to incorporate changes and create legislation that would interfere as little as possible with the mechanics of indigenous practices such as hundi. Once again, implicit in the government's strategy lay recognition of the intrinsic value of hundi, although in this discussion the emphasis is on its significance for merchants.

The court cases reveal that the court overruled customary mercantile practice of hundi where this was ambiguous. It was not the case that the courts merely dismissed customary practice, and indeed they often recognized customary practice. However, when customary practice was overruled, it was because they deemed it insufficient for maintaining the integrity of a given hundi contract, or too opaque to establish the liability of hundi parties. In such instances, they largely drew from the NIA, and occasionally other relevant Acts.

At times, hundi customary practice was articulated more strongly by the courts, particularly where such practice was itself embodied in an indigenous mercantile institution such as the Marwari Association. For the courts, such institutions were closer to the English model by laying down less ambiguous or fluid rules. However, even then, there was some scope for the courts to more liberally interpret such customs, according to their own

principles of equity and justice. The courts' selective recognition of hundi custom was consistent with the government's goal of assimilating indigenous practice to the English model. Ultimately, court arbitration of hundi, and the application of the NIA thereto, left a more formal imprint upon the instrument's character, which not only affected its negotiability, but also its contractual integrity. Furthermore, Indian mercantile litigiousness within the courts and some merchants' recourse to the application of the NIA's provisions over customary practice -- as seen with the discharge of debt case -- signals a change in the way that merchants viewed the enforceability and logic of customary hundi practice.

## **Chapter 6 A Study of Indigenous Business Practices and State Interaction in the 1930s.**

Hundi's status was often marginalised because it was perceived to have currency only amongst Indian merchants, otherwise known as indigenous bankers. This situation is particularly apparent with advent of the Provincial Banking Enquiry Committee Reports (PBECRs). Unique in scope and breadth, the PBECRs of the 1930s serve as a repository of information on how the colonial government conceptualized hundi and its position within the Indian economy. The PBECRs systematically enquired into banking and financial activities within specific provinces, across the length and breadth of India and even Burma. These reports were to assist the government with the setting up of the centralized, government administered banking institution known as the Reserve Bank of India. Strikingly, from the reports, it emerges that hundi was perceived and used as a marker for indigenous banking and its patterns of business organization. Given its importance in the Indian economy at the time, one part of this discussion centres on analyzing why hundi was used in this way. The second part of the discussion uses information compiled on hundi as a means of reading the credit relationship between indigenous bankers, the Imperial Bank, joint stock banks and the government. Significantly, the banking enquiry evidence differs from the court cases in earlier chapters, by providing the voices of the indigenous banker and merchant.

The main focus throughout is on the evidence volumes rather than the reports themselves. Since the evidence volumes break down the information provided by a given agent or association, this is an important methodological distinction. As is evident from the titles of the PBECRs, the

content of the studies is arranged by province. The Banking Committee's main consideration was to assess banking activity in all its forms within each province. In other words, they wished to provide a survey of each province. However, this analysis is about how hundis reflected the relationship between mercantile communities and the Imperial Bank and government. Though there are several evidence volumes provided by the PBECRs in other locations, it was felt that scrutiny of one location would facilitate more than a cursory overview. Already in 1911, the British had formally moved the political capital to Delhi from Calcutta. And by the 1930s, the commercial importance of Bombay had begun to rival Calcutta – the former capital of the East India Company—and was soon to eclipse it in importance. Thus, because of the location's importance in business, the second part of this study largely concentrates on the accounts provided by the various mercantile or shroff associations in Bombay.

The PBECRs report the presence of a number of bazaars making up the indigenous banking sector. Each one was operated by particular merchant communities with their extensive networks. One notable study which draws from the PBECRs is Rajat Kanta Ray's seminal work on the *bazaar*. Ray's work on the bazaar provides a detailed macro analysis of the indigenous banking economy.

Crucially, Ray's notion of the bazaar was that of a financial and trading network which was not merely autonomous, nor merely functioning at the periphery of a global system of credit and trade centred on Europe. He argued that the bazaar, or indigenous banking, operated, not simply as a fractured subordinate, but rather as a "sophisticated" intermediate sector, within the three-tier economy which emerged in the nineteenth century.



Intersecting “the Western business and financial sector” and “the subsistence economy of the millions of peasants, artisans and pedlars, operating on metallic currency rather than paper credit”,<sup>273</sup> the bazaar adapted to and penetrated both sectors.

Hundi is described by Ray as a key instrument underpinning the crucial financial skills that characterized mercantile communities and their networks.<sup>274</sup> The instrument is presented as a central pillar of the bazaar along with *arhat*--the commission agency. Taking us through his understanding of hundi’s evolution from an “assignment” for the maintenance of soldiers, Ray highlights its development as a “trade bill” used for remittance and accommodation at the peak of Surat’s trading importance in the seventeenth century. Sketching its significance for the major banking houses in Benares, and then later for trade in Bombay and Calcutta, Ray provides an insightful overview of hundi’s various functions and their significance for the bazaar.

Although he identifies the hundi bazaar as having been “fragmented” with several vital variances in rates, Ray’s focus lies in drawing an understanding of hundi’s role in the bigger picture. He neatly delineates those major mercantile communities contributing to hundi flows of money, and highlights some of the key principles determining their usage in broad brush terms. Ray’s exposition does not however, map the relationship between indigenous bankers, the Imperial government and the government. It is here that delving into information compiled on hundi within the PBECRs can

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<sup>273</sup> Ray, “Asian Capital in the Age of European Domination: The Rise of the Bazaar, 1800-1914.” P. 552.

<sup>274</sup> See chapter one, pp. 25-26.

build on Ray's portrait, and importantly paint some of those dynamics which set the coordinates for hundi's future and that of indigenous banking.

### **6.1 Hundi used to Generate a Reading of Indian Indigenous Banking**

The Banking Committee wished to understand which key indigenous banking communities operated within each of the regions, and what forms of credit were primarily employed. In all four reports referred to within this discussion, hundi emerges as a prominent form of credit because of its pervasiveness and liquidity. As we shall see, the government perceived hundis as markers for the financial scale, standing and business connections of Indian merchants. Consequently, every PBECR devoted some time towards gathering more information on the use of hundis within provinces.

In general terms, the presence of hundis aided the Banking Committee in identifying the composition of banking activity within the different provinces. For this reason the Committee set out to understand what comprehension of hundis was within specific regions, and how hundis were employed by different communities. The Bengal, Bombay and Madras PBECRs are important not merely because they were key economic hubs, but also because they were the loci for the three Presidency Banks, which, in 1921, were amalgamated to form the Imperial Bank of India. These banks and indeed the later Imperial Bank, formed the most significant centres for modern banking in India prior to the setting up of the Reserve Bank of India. The Burma PBECR is important as an illustration of the use of hundi in a non-native environment. Thus, in Burma, the hundis employed by the mercantile communities serve a cross-border function, and it is this that deserves greater scrutiny.

Methods used by the respective PBECs to better understand hundi, shed some light on the information itself. These methods influence the type of information that was obtained by the PBECs. Although a standard questionnaire was issued by the Central Banking Committee, all the PBECs chose to modify the standard questionnaire to furnish more detail about the particular province they were studying. Modifications ranged from opting to insert additional questions, to drawing up completely fresh questionnaires. Sub-committees were also formed in some provinces, to gain more detailed information across the breadth of the province. Differences in the type of evidence collected are also apparent, notably, in some cases written evidence was collected and a comprehensive set of answers was filtered by the PBEC, rather than the actual responses themselves. Some committees on the other hand, also relied on oral as well as written evidence, and this in turn may have produced a more nuanced understanding of hundi.

The *Standard Questionnaire* generated by the Provincial Banking Committee enquired into the functions of the indigenous bank or bankers within a given district or province. Drawing from the Central Banking Enquiry Committee, a standard definition of indigenous banking was adopted by the Provincial Banking Committees. This definition distinguished between indigenous bankers who accepted deposits, and those who did not.

While the characteristic “acceptance of deposits” was a key attribute of contemporary 1930’s banking, the Banking Committee was, nevertheless, acutely aware of the ambiguities arising from any definition of banking, particularly in the Indian context. Some classes of Indian financier did not fit the mould of modern banking, but were still regarded as indigenous bankers.

Acceptance of deposits being an essential feature of modern banking, the definition may perhaps include all bankers in some countries, but several financiers who are generally known in India as indigenous bankers would find no place in such a definition. Some of them do not receive deposits but rely on their own capital and credit for their business.<sup>275</sup>

Of key significance, the standard definition also used the designation “indigenous banker” to describe “any individual or private firm receiving deposits and dealing in *hundis* or lending money.” Clearly, hundi activity was central enough to the activities of indigenous bankers for it to denote a core identifying characteristic of these financial agents. In fact, the character of dealing in hundis appears to have been a consistent ascribed attribute of the indigenous banker, while the feature of “receiving deposits” was not. Multani indigenous bankers, or *shroffs*<sup>276</sup>, as they were better known, did not receive deposits, however they had an extensive business in hundis. Moreover their sphere of influence in the hundi business, endowed them with wide recognition as shroffs. In Bombay, the Multanis had “extensive” hundi business with the Imperial Bank.<sup>277</sup> For this reason, the Bombay Committee made an exception of the Multanis, and included them under the banner of indigenous bankers.

The Madras PBECR also concluded that it was “impossible to draw a hard and fast line” between the indigenous bankers and money lenders.<sup>278</sup> However, it too identified specific communities whose social and financial organization provided them with the distinction of being *indigenous bankers*.

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<sup>275</sup> "Report of the Bombay Provincial Banking Enquiry Committee, 1929-30," (Bombay 1929-30). Vol. I, p.195.

<sup>276</sup> The term *shroff* denoted was the native Indian word for banker or money changer. The word derives its roots from the word *sarraf* in Hindi or Urdu, ultimately with origins in Persian.

<sup>277</sup> "Report of the Bombay Provincial Banking Enquiry Committee, 1929-30." Vol. I, p.195.

<sup>278</sup> "Report on the Madras Provincial Banking Enquiry Committee," (Madras 1930). Vol. I p.185.

There are, however, certain communities which carry on business with their cast esprit-de-corps at their back and with large funds of their wealthier members which will be at their disposal at special rates and terms for use in what is believed to be sound business on the customary lines of finance practiced by the particular community.<sup>279</sup>

The primary means for organizing and extending these "lines of finance" appears to have been hundis. Certainly, remittances were only effected through hundis as this seems to have facilitated drawing upon their own sources of credit.<sup>280</sup>

Commenting on the definition adopted in the standard questionnaire, the Bengal report provided similar reasons for not strictly adhering to the standard definition of indigenous bankers: "There are not many indigenous bankers at present in Bengal who satisfy both the conditions of this definition. So we have practically limited our investigation on indigenous banking to individuals and firms who deal in hundis whether they take deposits at present or not."<sup>281</sup> A little later in this description the Bengal Committee adds that while the indigenous money-lender loans money, he does not have business dealings in hundis. "The only distinguishing characteristic of the indigenous banker is therefore dealing in hundis."<sup>282</sup>

The Marwaris were the dominant indigenous banking group in Bengal. Hundis provided the significant function of financing internal trade for these bankers,<sup>283</sup> and were thus categorized as "internal bills of exchange" in the

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<sup>279</sup> Ibid. Vol. I, p. 185.

<sup>280</sup> Ibid. Vol. I, p. 143. "In fact among the indigenous bankers the only instrument of credit used for remittance based on credit among themselves is the hundi."

<sup>281</sup> "Report of the Bengal Provincial Banking Enquiry Committee, 1929-1930," (Calcutta: Bengal Govt. Press, 1930). Vol. I, p. 185.

<sup>282</sup> Ibid. P. 185.

<sup>283</sup> Bengal (India). Provincial Banking Enquiry Committee., *Report (and evidence)*, 3 vols. (Calcutta, 1930). Vol. I., p. 187.

Bengal report. However, they also raised money for loans – time or *muddati* hundis – and were seen therefore, to correspond to finance bills.<sup>284</sup> Finally, hundis also served to remit money from one place to another – sight or *darshani* hundis – however this latter category of hundis did not reveal greater circulation than any other.<sup>285</sup> We cannot tell what kinds of transactions these darshani hundis served, as the hundis themselves did not contain such references. Muddati hundis depended on the personal credit of the borrower, and though they did not expose the nature of the transaction, they do reveal the financial standing of parties to the transaction. Similarly, though these hundis were not strictly negotiable in banks, in practice they could be rediscounted, again depending on the personal credit of endorsing shroffs.<sup>286</sup>

All three Provincial Banking Committees discussed,<sup>287</sup> espoused a definition of indigenous banking which underscored the primacy of hundi activity. In the Burma PBECR, the committee recognized that a fresh definition of indigenous banking, specific to the context, was required. Since the indigenous population in Burma were not Indians, the Committee needed to define their understanding of the word *indigenous*. It concluded that “the term *indigenous finance* is used to mean banking and moneylending according to traditional Indian customs without the general adoption of the methods of Europe or America.”<sup>288</sup>

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<sup>284</sup> Ibid. Vol. 1., p. 189.

<sup>285</sup> Ibid. Vol. 1., p. 126.

<sup>286</sup> Ibid. Vol. 1., pp.126-127.

<sup>287</sup> Bombay, Madras and Bengal.

<sup>288</sup> "Report of the Burma Provincial Banking Enquiry Committee, 1929-30." Vol I, p. 186.

Why did the Committee adopt this understanding of indigenous banking? Outside money-lending, the Committee reported that native Burmese financial agents did not carry out any of the functions of indigenous banking that the standard definition ascribed to this activity.

Even though, the link between hundis and indigenous banking was not as emphatically articulated, in the Burma PBECR too, we can interpret hundis as an identifying characteristic of indigenous banking. Here, hundis constitute one of the “most commonly used” credit instruments in Burma.<sup>289</sup> Furthermore, the report goes on to say that:

Conditional hundis are unknown in Burma. Further, if the bills of exchange used by Europeans and Americans and a few others are excluded, all hundis which are in the form of orders to pay are made payable at sight. Thus in Burma the term hundi means a document arising amongst Indian or indigenous traders or financiers and containing either (a) an unconditional promise by the maker to pay a certain sum of money after a certain period, not on-demand, or (b) an unconditional order by the maker directing a certain person to pay a certain sum of money on demand.<sup>290</sup>

The report dwells in some length on the importance of the *Nattukottai Chettiars*, the South Indian mercantile community known commonly as the Chettiars. It is largely to this community that the report refers in its analysis of indigenous banking activity; this despite acknowledging that the Chettiars were both “no less foreign than the exchange banks”,<sup>291</sup> and that the major portion of their capital originated in India.

Three notable qualities ascribed by the committee to the Chettiars, were the strength of their “organisation as a financial system”, “their sodality” and

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<sup>289</sup> Ibid. P. 146.

<sup>290</sup> Ibid. Vol. I, p.150.

<sup>291</sup> Ibid.

“the magnitude of the total business done by them”. The Burma PBECR provides an interesting point of comparison with the Madras PBECR, where the Chettiars are also prominent indigenous bankers.

The Chettiyar banking business consists to some extent in discounting trade hundis though this business is not very large in the Madras Presidency but they themselves issue large numbers of hundis for transmission and accommodation mainly of three kinds:-

- (i) Darsanai hundis.
- (ii) Nadappu vaddi hundis.
- (iii) Usance hundis payable at a fixed period after date or sight.

These hundis are largely used for accommodation purposes and for remitting funds to the Chettiyar houses in this province from the Straits, Burma and Ceylon.<sup>292</sup>

Given the weight of information underscoring the centrality of hundis to indigenous banking, we might now take our exploration of hundis further.

Why were hundis so significant in all four provinces? The Madras PBECR determined that the worth of hundis was entirely context specific. This not only encapsulated usage, or function, but also the experience and position of the agents employing the hundis. Despite their wide circulation, the value and usage of hundis was tied to the personal knowledge of transacting parties. All discounting and negotiation of these instruments was effected on the basis of the understanding of transacting parties.<sup>293</sup>

Negotiability was the key to hundi's significance within all the major mercantile communities. In all four provinces the major mercantile communities—understood as the indigenous bankers in the PBECRs—

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<sup>292</sup> "Report on the Madras Provincial Banking Enquiry Committee." Vol. I, p. 187.

<sup>293</sup> Ibid. Vol. 1, p. 142.



demonstrated a strong reliance on hundi. Embedded within the general questionnaire, and all other questionnaires devised by the PBEs, there is an attempt to understand hundi's negotiability. How was hundi negotiable? What functions of hundi provided the greatest negotiability? How negotiable was hundi in relation to other credit instruments? How distinct was it in relation to other credit instruments? Was its usage waxing or waning? Was its value such as to warrant a reduction in stamp duty, or even the abolition of any applicable stamp duty in order to further stimulate its usage? Much of this confirms that the banking committee was unsure of how and where hundi had currency. The voices of the various shroff or mercantile associations are thus particularly valuable in gauging hundi negotiability.

These voices are also indispensable in establishing the wider context within which hundi was operating. More specifically, the voices articulate the relationship between indigenous bankers and the Imperial Bank. The remainder of this discussion scrutinizes hundi negotiability, and its particular limitations through an examination of its relationship with the Imperial Bank and government.

The remainder of this discussion scrutinizes hundi negotiability, and its particular limitations through an examination of its functioning in Bombay and relationship with the Imperial Bank and government. There are three aspects of this relationship that deserve our attention: first, lending within the indigenous banking economy and between the Imperial Bank, as well as the financing of internal trade through hundis. Indigenous bankers faced competition with the Imperial Bank and other commercial banks, and this had particular consequences for hundi operations, as such, this forms the

second category of enquiry. Finally, hundi standardization and legislation affecting hundi forms the corpus of the third aspect.

## 6.2 Lending and the Internal Financing of Trade

From the Bombay Shroff Association it is clear that the government had very little part to play in the financing of internal trade. Indigenous bankers were dominant in this sphere and had limited interaction with the Imperial Bank. Only a small portion of internal trade was carried out through the Imperial Bank via cashing *darshan* or sight<sup>294</sup> hundis but mostly at a rate lower than the quoted hundi rate. Usually, this exchange feature is only offered to a small number of the mercantile community:

These facilities are moreover not extended to the local mercantile community generally but only to a small number whose hundis are taken though only to an extent which is much smaller than would be warranted by his standing and resources.<sup>295</sup>

The account indicates that there was little integration and symmetry of information between the Imperial Bank and indigenous bankers. Many indigenous bankers were not accorded the recognition that they had attained within their own business circles, impacting on the circulation and importance of hundis more generally.

With limited means of assessing indigenous bankers at its disposal, the Imperial Bank usually relied on a *Khazanchee's* Opinion Book. The *Khazanchee* or Treasurer was employed by the bank to provide an assessment of merchants' creditworthiness and standing in a way similar to modern-day

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<sup>294</sup> See chapter one for more details on this type of hundi.

<sup>295</sup> "Report of the Bombay Provincial Banking Enquiry Committee, 1929-30." Vol. III, p. 490.

credit check agencies. He also served as a kind of guarantor for Indian merchants that were evaluated as credit worthy. The Madras Presidency Bank Khazanchee Opinion Book, shows that assessments provided were frank and encompassed more than mere statistics, relying on reputation and the opinion of others. The opinions obtained by the Khazanchee were usually responses to bankers' enquiries. Here is an example of a few assessments under the entry P:

Under P

P. Puniacotty Moodi

Nelghin House, Coimbatore

1914 April 26

Report worth Rs 60/80,000. –The family recently divided.<sup>296</sup>

1916 Jan 10.

General merchant reported to be worth Rs 50/60,000.

Has an outstanding liability and a clean credit at Coimbatore Branch.<sup>297</sup>

1920 Oct 25

General merchant landed proprietor owning estates in the Nilgiris, house properties in Coimbatore **nothing** places.

Stands in Coimb O.Bank as worth Rs60/70,000 but the outside opinions import him worth Rs 1 lac.

Has direct liability of Rs 10,000----- & **Indemist** Rs 5000-----at Coimb Bch (branch).<sup>298</sup>

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<sup>296</sup> "Khazanchee's Opinion Book, 1914-1922," in *State Bank of India Archives* (Calcutta). File, (Coimbatore 24/4/14)

<sup>297</sup> Ibid. Coimbatore Br. Letter no 13/3 of 10.1.16

<sup>298</sup> Ibid. Sec op.L No.344 of 25.10.20.

With certainty we can conclude that the negotiability of hundis had little to do with the Imperial Bank. If anything, the Imperial Bank appears to have been a hindrance to the hundi operations of Bombay merchants. The Bombay Shroff Association claimed that *mudati* or usance hundis had particularly suffered because of the Imperial Bank's disregard for the instrument. This was largely due to the near absence of financing, the application of a cumbersome stamp duty and the lack of rediscounting facilities with Imperial and joint stock banks. One of the complaints directed at the government and commercial banks was that they overlooked the considerable importance of hundis, and failed to look into the root causes and implications of the virtual extinction of *mudati* hundis for the economy and circulation of credit more generally.

These hundis are very useful in the expansion of trade and credit facilities and while banks in most of the countries of the world utilize a big portion of their funds in this branch of business in India only an infinitesimal amount is lent for such business by the Imperial Bank. As long as these credit documents are not utilized to the fullest extent, proper banking facilities leading to general growth of trade and commerce will rightly be held to be non-existent. Stamp duty on the internal time hundis should be altogether abolished and discounting and rediscounting facilities should be extended in an increasing measure.<sup>299</sup>

Hundi rates reflected the types of transactions conducted by Indian merchants, the reputation and financial soundness of the various parties, and community affiliation. A 'first class hundi' was a classic example of a bank approved hundi, and a context in which certain kinds of hundis were accepted by the Imperial Bank. First class hundis were those issued by Indian merchants or bankers who had a collateral of approximately 5 lakhs rupees or above.<sup>300</sup> Nameless hundis or perceptions of riskier hundis were

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<sup>299</sup> "Report of the Bombay Provincial Banking Enquiry Committee, 1929-30." Vol. III, p. 491.

<sup>300</sup> Bagchi, *The evolution of the State Bank of India. Vol.2, Era of the presidency banks, 1876-1920.*

often rejected. This had been the Bank's practice for many years. For instance, agents of the Bank had the power to refuse hundis as they deemed fit, often causing tension with members of the Bazaar. The minutes from a meeting held by the directors of the Bombay Presidency Bank in 1870 outline one such scenario with indigenous bankers. In this account the Bank's agent judges the various hundis offered as unsuitable, leaving a number of disgruntled indigenous bankers, and the Bank approves his risk-averse course of action. Reading between the lines, it is clear that the Indian mercantile community felt that this was a breach of conduct.

Read letter from Indore Agent reporting a temporary difficulty which has arisen between himself and the Bazaar in consequence of his refusing sundry hoondies tendered in fulfilment of contracts, but expressing a hope that by a conciliatory attitude he may be able to remove all ill feeling.

Noted. The Agent in the exercise of his admitted right, must not hesitate to reject all hoondies that are not perfectly satisfactory.

Read letter from Indore Agent under date 25<sup>th</sup> July asking permission to sue Burudkhan Amichand for the balance of his past due hoondie, and to ask the courts' permission to recover the Bankers' claim by the sale of the house mortgaged to it.

Sanctioned.<sup>301</sup>

In 1870, a context like this may well have been an additional source of dissatisfaction for indigenous bankers given that most lending of Presidency Banks was carried out through Indian merchants.<sup>302</sup>

In the 1930s, these lending circumstances had changed, and Indian merchants with sufficient standing, did draw on the Bank's resources. In response to restrictions of credit imposed by the Imperial Bank, merchants

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<sup>301</sup> "Special Meeting of the Directors," in *Minute Book of Bombay State Bank of India* (Calcutta 1870). P. 514.

<sup>302</sup> — — —, *The evolution of the State Bank of India : the roots, 1806-1876. Part 1 , The early years, 1806-1860.*

often adopted their own channels of obtaining capital. Within the confines of each of the mercantile communities, wealthier members allowed small-scale businessmen of the same community to avail of the significant capital they owned. This made it possible for prominent merchants to offer preferential rates of interest<sup>303</sup> to his small-scale *biradari*.<sup>304</sup>

The Bombay Shroff Association offered a stringent critique of the Imperial Bank's relations with the community. Not only did the Bank fail to recognize the status of shroffs as "fellow bankers", but it also treated the shroffs just like any other clients.<sup>305</sup> On the matter of hundis and credit, it accused the Imperial Bank of being very 'reluctant' to deal in discounting hundis. At most, the Bank dealt in hundi business amounting to four or five crores<sup>306</sup> only.

Blame is also laid squarely at the Imperial Bank's door for the shortage of 'trade bills' or hundis in India. "...the Imperial Bank of India has failed to create market for these bills by showing a great unwillingness to discount them in large numbers which should have been its primary function as the premier banking institution of the country."<sup>307</sup>

Of the recommendations made by the Association, it stipulated that the setting up of the Reserve Bank of India (RBI) should replace the Imperial

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<sup>303</sup> "Report on the Madras Provincial Banking Enquiry Committee." p.185. David Rudner also writes of this in his seminal work on the Chettiars: Rudner, *Caste and Capitalism in Colonial India: The Nattukottai Chettiars*.

<sup>304</sup> *Biraderi* is a Hindi and Urdu word which carries the senses of brotherhood, kinship, community, fraternity and caste.

<sup>305</sup> "Report of the Bombay Provincial Banking Enquiry Committee, 1929-30." Vol. III, P. 495.

<sup>306</sup> One crore is ten million.

<sup>307</sup> "Report of the Bombay Provincial Banking Enquiry Committee, 1929-30." Vol. III, P. 496.

Bank. In addition, the RBI should breach the abyss created by the Imperial Bank, and “create a market for trade bills (hundis) by discounting them through parties dealing directly with the bank.”<sup>308</sup>

It is clear too that the Association found the Imperial Bank restrictive in terms of the lending duration on bills. While in theory the Bank was allowed to accept hundis drawn up to three months, in practice, the Bank regularly prescribed a much shorter period of acceptance. The Association found that this stifled trade, and recommended that the Bank accept bills for up to six months instead.<sup>309</sup>

### **6.3 Karachi Indian Merchants Association (KIMA) and Buyers and Shippers Chamber (BSC)**

Shroffs had an important credit role to play in the mofussil. Sindhi shroffs for instance, provided for up to 70 to 90 per cent of the value of goods in transit for internal trade.<sup>310</sup> According to the Karachi Indian Merchants Association (KIMA) and Buyers and Shippers Chamber (BSC), most of the credit was provided through rediscounting of bills by Sindhi shroffs themselves, with only a small proportion of bills being “eventually” rediscounted by the joint stock banks. These banks were seen to have “undermined” some of the business of Sindhi shroffs while at the same time acting as a “very valuable supplement to them.”<sup>311</sup>

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<sup>308</sup> Ibid. P. 499.

<sup>309</sup> Ibid. p. 500.

<sup>310</sup> Ibid. Vol. IV, p. 8.

<sup>311</sup> Ibid. Vol. IV, p. 8.

Once again however, criticism was directed, this time at the exchange banks, for providing limited financing of internal trade. They are seen to provide no function in the financing of internal trade, being instead focused on foreign exports and imports. It is for companies engaged in this kind of activity that the exchange banks reserved their superior facilities. In fact, since this kind of trade was for the most part the preserve of large non-Indian import and export houses, the exchange banks were seen as prejudicial to Indian interests.

Cases are usual where these [exchange] banks have discriminated between Indian and European clients under the vague plea of credit estimation. The spirit of disparagement of everything Indian, however, is too evident to be disregarded as a possible reason for such discrimination.<sup>312</sup>

Exchange banks were also accused of “diverting Indian capital to foreign investments”. A public case was cited as a supporting example.

...an exchange bank discredited the policies issued by an insurance company on the ground that the company had rupee capital and was incorporated in India. This is hardly fair in view of the fact that these foreign banks draw an enormous amount of deposits from Indians alone. In fact these banks thus obtain greater amount as deposits from Indians alone.<sup>313</sup>

Discrimination against Indian clients appears to be a recurring theme. These exchange banks were also seen to apply unfair terms to Indian merchants conducting foreign trade. As mentioned previously, exchange banks were in a position of dominance in this sphere. This “virtual monopoly” was compounded by a strong association which gave these banks leverage in

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<sup>312</sup> Ibid. Vol. IV, p. 9.

<sup>313</sup> Ibid. Vol. IV, p. 9.



controlling terms. It is implied that these were often unfavourable to Indian merchants.

KIMA and BSC also claimed that when it suited these exchange banks, particularly when competition was fierce, the banks would usurp the function of Indian joint stock banks. They were seen by the Indian banking community as operating with unfair advantages even in the area of the internal financing of trade. "Owing to keen competition amongst themselves, the exchange banks often to try to make income by extending their activities and discount local bills, advance loans against properties, etc."<sup>314</sup>

According to the Shikarpur Shroffs' Association, shroffs who advanced money on hundis also had dealings with several joint stock banks, which were operated by both European and Indian agencies. Hundis of one or several merchants were endorsed by these shroffs over documents relating to goods, and therewith were able to acquire a degree of finance from a joint stock bank. During periods in which there was little trading activity, these shroffs deposited money in current accounts with the joint stock banks. In this way, their relationship was believed to be of reciprocal benefit.<sup>315</sup>

Shikarpuri shroffs did not limit their activities to the joint stock banks; they also discounted hundis with the Imperial Bank on a massive scale. Such was the level of activity that the interest rate levied on hundis was determined by the bank discounting rate as a base. A guideline of between two to four per cent over the bank rate was set on hundis. This held the drawer, drawee, and the endorsing banker responsible for the transaction.<sup>316</sup>

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<sup>314</sup> Ibid. Vol. IV, pp. 9-10.

<sup>315</sup> Ibid. Vol. IV, p. 341.

<sup>316</sup> Ibid. Vol. IV, p. 341.

However, despite the substantial scale of hundi operations with the Imperial Bank, here too disgruntled Shikarpuri voices joined the clamour of other shroffs. In terms of the facilities provided by the Imperial Bank the Shikarpuri shroffs asserted that the limits set by the Bank also did not correspond to the position of Shikarpuri shroffs. Moreover, it would seem that that the Imperial Bank may have used its dealings with the shroffs to directly compete for their customers, as seems to be implicit in this statement:

The bank should not compete with the shroff. As the things stand the shroffs discount their hundis with the bank, this letting the bank officers know the names of their clients. The bank officers should scrupulously avoid to have direct dealings with the clients of the shroffs whose names they know in this way. <sup>317</sup>

The Imperial Bank also seems to have encroached on the shroffs' business in two other ways, first through its presence in the Shikarpuri shroffs' business localities: "The Imperial Bank should not open new branches as the business of shroffs suffers thereby." Second, shroffs previously provided large European purchasing export entities with funds. However, this kind of business declined when shroffs' business profits shrunk after the Imperial Bank reduced its remittance charges. <sup>318</sup> Presumably, remittances sent by hundis were subsequently less competitive than remittance services through the Imperial Bank.

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<sup>317</sup> Ibid. vol. iv, p. 342.

<sup>318</sup> Ibid. vol. iv, p. 342.

#### 6.4 Rates of interest at odds with the Imperial Bank

One major problem for Shikarpuri shroffs was the disparity between the bazaar hundi rate and the Imperial Bank. It would appear that while the Bank's rate was fixed, the bazaar rate tended to fluctuate considerably.

... there are other considerations governing the *bazaar* rate. Sometimes the money is very cheap, and there is no demand for it during the slack season, and people want to utilise that money, so at that time the rate is very low and perhaps lower than the bank rate even.<sup>319</sup>

During the course of their enquiries the Bombay PBEC found that hundis formed the chief business of Shikarpuri shroffs.<sup>320</sup> Very little deposit banking was undertaken because as the simplicity of hundis had increased, namely they were easy to use, so did their popularity amongst mercantile and non-mercantile people alike. Adding to their popularity was the ease with which even small sums of a few hundred rupees, could easily be sent via hundi. Shikarpuri shroffs also used hundis for a range of other activities. Grain dealers largely financed agriculturalists through cash credit gained through Shikarpuri Shroffs who wrote and drew hundis on their behalf. The Shikarpuris also financed small industries such as "pressman, thread-makers, bottle-makers and other small industrialists" through hundis.<sup>321</sup>

#### 6.5 Hundi Standardization and Legislation

In the next few chapters, we shall establish hundi's position as a source of revenue which, from the 1880s, the government sought to capture through the Indian Stamp Act. This particular act represented one means by which

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<sup>319</sup> Ibid. vol. iv, p. 352.

<sup>320</sup> Ibid. vol. iv, p. 353.

<sup>321</sup> Ibid. vol. iv, p. 353.

the government spearheaded measures to standardize hundi during the British colonial period. However, customary Indian practice in relation to English law and practice continued to vex the British Indian government. For the purposes of administration, it seemed much easier for the government to simply adopt English law and banking practice within India, and force indigenous banking practices into conformity therewith. In practice, however, the institution hundi served several indigenous interest groups, and many during the 1870s and 1880s did not want custom done away with. In part, this explains the dichotomy represented by hundi's inclusion within the Indian Stamp Act of 1879, and its exclusion from the Negotiable Instruments Act of 1881, except where customary practice could not apply. This middle ground created its own complications, as we saw in chapters four and five.

Thus the problems arising from divergent indigenous and Imperial banking environments were particularly pressing. As such, the Bombay PBEC raised the question of how hundi could be developed and made to co-ordinate with the other Banking system. As the evidence from the PBECR's shows, hundis carried additional value as an almost ubiquitous form of credit liquidity across the length and breadth of India. In seeking to encourage hundi, the Banking Committee recommended measures to remove obstacles to hundi's advancement. Some of these recommendations called into question existing legislation. Naturally, the question of standardization became the subject of consideration, however, this was subject to a number of problems.

Other acts, for instance, impinged on hundi during this period. Shikarpuris seemed unanimous in their condemnation of 'discriminatory laws'. One law related to delays or obstacles in the execution of decrees on suits of negotiable instruments. Shikarpuri shroffs recommended that these laws be

repealed or rendered inapplicable to suits on negotiable instruments. Yet another complaint was levelled at the perceived inflexibility pertaining to the period of limitation on suits on negotiable instruments.<sup>322</sup> Shroffs argued for a more favourable period; for instance, an extension of the period of limitations on suits on negotiable instruments from three to six years. Three years was considered too short a period of term for a client to make repayment. Six years was felt to be more beneficial for the debtor as well as the banker, who could thereby receive greater assurance of repayment.<sup>323</sup>

The passing of certain Acts such as the Dekkhan Agriculturalists' Relief Act and the Sind Encumbered Estates Act, discouraged Shikarpuri shroffs from doing business in Sind. Instead, their preferred locations of business were Burma, Colombo and Madras.

Before the passing of the Act, the shroffs used to advance money to grain merchants, and the grain merchants used to invest their money with cultivating classes. The hundis of merchants in villages were easily sold in cities, but after the passing of these Acts hundis are not sold in cities. The shroff also does not wish to lock up his money for long periods.

In general, Shikarpuri shroffs objected to the regulation of trade, and indicated that its practical function served to discriminate against indigenous bankers. In turn, though a significant portion of trade and commerce was conducted by "foreigners", this was perceived as unregulated. "In India a large volume of the trade and commerce is in the hands of the foreigners. Before regulating the shroff, all this business should be regulated."<sup>324</sup>

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<sup>322</sup> Ibid. vol. iv, p. 344.

<sup>323</sup> Ibid. vol. iv, p. 357 (oral evidence)

<sup>324</sup> Ibid. vol. iv, p. 345.

These shroffs portrayed their position as a provider of important services which were not, or could not be, provided by the banks. Acting as guarantors with the banks on behalf of the agriculturalist, trader and artisan, shroffs describe themselves as undertaking risks with their own and others' funds, which the banks, it is implied, would not assume. Since legal restrictions shackled such critical activities, shroffs felt that these legal impediments were applied by those who either sought to discriminate against shroffs, or who had inadequate knowledge of the banking activities carried out by shroffs.<sup>325</sup>

For Shikarpuri shroffs, most of this financing was carried out through hundis. By discounting hundis at key money markets across the country, shroffs were able to supplement their own capital and that of their community members in profitable markets. These hundis were acceptable in many towns through Madras, Burma and Bombay.<sup>326</sup>

## **6.6 Multiple Customary Practices Impede Hundi Circulation**

On the other hand, while Shikarpuri shroffs were not keen to be subject to specific forms of regulation, there appears to have been a growing interest in seeing hundi standardized. This desire to standardize hundi stemmed from recognition of specific difficulties that had arisen over the years as a consequence of hundi's exclusion from the Negotiable Instruments Act of 1881. The Shikarpur Shroffs' Association indicated that vernacular—in this case Sindhi—forms of hundi were largely not used. This was because

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<sup>325</sup> Ibid. vol. iv, p. 345.

<sup>326</sup> Ibid. vol. iv, p. 346.

English had become “the common language of India”, and therefore hundis in printed English could be more widely circulated.<sup>327</sup>

Another challenge to hundi were the customary practices themselves which appear to have presented obstacles to those indigenous banking activities, like hundi, that were not confined to communal circles. There is an implication here that the business of indigenous bankers had increasingly grown to encompass transactions with agents outside their own communities. The Karachi Indian Merchants Association (KIMA) and the Buyers and Shippers Chamber (BSC) stated that they wanted hundi to be included within the Negotiable Instruments Act. These bodies themselves judged that the multiple customary practices of hundi were hindering its circulation by rendering any validation of their authenticity very difficult.

Legislation might help shroffs if the hundi is standardised and brought within the meaning of a negotiable instrument. This would really mean standardisation of usages and customs governing hundis throughout India. Such standardisation though difficult should not be impracticable and when achieved the hundi is likely to be the most popular document with all concerned. At present there is very little to help an outsider to adjudge and estimate the credential and usages of several firms of hundis. The Federation of Indian Chambers of Commerce and Industry may well take up this matter and suggest a tentative scheme to the Government for suitable legislation.<sup>328</sup>

Evidence supplied by representatives of the Indian Merchants Association (IMA) and Buyers and Shippers Chamber (BSC), also indicate that there was a desire to see hundi standardized. Since there was an overlap in membership between KIMA, BSC and IMA,<sup>329</sup> that is, many members

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<sup>327</sup> Ibid. vol. iv, p. 355.

<sup>328</sup> Ibid. Vol. IV, pp. 10-11.

<sup>329</sup> Ibid. Vol. IV, p. 12. There were 100 common members of both the IMA and BSC. Of the 334 BSC members, roughly one-third were also members of KIMA

belonging to all three associations, this is perhaps not surprising. Hundi's negotiability was hindered by different customs pertaining to its usage in "every city and town".<sup>330</sup>

Differences in some of these hundi usages are articulated as follows: i) presentation time; ii) payment time; iii) time of acceptable retention of dishonoured hundi; iv) rate of interest in the event of dishonour; v) should hundis be honoured on holidays?; vi) if not on a holiday, a day before or after?; vii) duration of grace period; viii) should mudati hundis be paid on a specific day, or a day later?; ix) which calendar should be observed – the Gujarati or English – in counting days?; x) if a hundi is dishonoured and returned, what rate of interest should apply?; xi) the rate of *nikraman shikraman* undetermined and varied; xii) which party should be held responsible if a demand hundi is written but circulated in such a way that it reaches one party late? And what rate of interest should apply in this event?; xiii) who should be held responsible if a mudati hundi is not presented at the right time, but rather a day subsequently? And what rate of interest is applicable?; xiv) Should the charge for protesting hundis in the event of dishonour, be contingent on the value in question, rather than a fixed rate as it is presently?; xv) protection of the rights of the writer of a hundi and of the shroffs should be given if a documentary hundi is not honoured; xvi) should a duplicate or triplicate hundi be issued in the event of loss, and how much time should be provided for reissuing?

From this description of anomalies, it is clear that merchants' usages may have been well articulated in a given location, but these often did not

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<sup>330</sup> Ibid. Vol. IV, p. 18 Response of Honorary Secretary of the BSC



correspond with other localities. Inevitably, this must have caused a great deal of uncertainty when doing business across several locations. As a parochial instrument, adherence to local usages would have worked well, but as the scale of business grew, local usages needed to map into more standardized formats. Though, the point about larger scale business transactions is not explicitly made, this would certainly appear to be the guiding influence in the BSC's response. The suggestion is clearly greeted with some surprise by the Banking Committee, as is evident in the following exchange between the Banking Committee representative and the BSC:

*Mr Buckley:* With regard to your suggestion about standardization of *hundis*, do you not think that they would appear unpopular if they were standardized? You know that the present system has been found very convenient and it has been followed for over a good many years. You are now suggesting that everything should be standardized.

- I think that if *hundis* are standardized, they will be much more popular.. They should be suitable to bankers.

Within this exchange, there is an acknowledgement on the government's part, that standardization could change the status quo of Indian mercantile methods too greatly. The Banking Committee Chairman followed this up with the Shikarpur Shroffs Association in order to verify how widely desired this standardization was. In the following discussion, it is apparent that for Indian mercantile associations, standardization of *hundis* was perceived as key for according greater recognition to indigenous banking.

The Chairman: It was brought to our notice by some witnesses in Karachi that the usages about *hundis* differ not only from place to place but sometimes even in the same place. Here a witness has given a list of 16 points about usages of which I will mention one or two. The first point is whether on holiday it is to be cashed on the previous day or on the following day, and so on. These are illustrations. We do not want you to commit yourselves to any of these things. The only question is whether there should be some standardization of the different usages or not?

---If we can agree to some formula about these things it is much better, but there are certain differences between our Association and other Associations. With us the time of payment is upto 6 o'clock in the evening, while with other Associations it is upto 4 o'clock. If all these usages are set at rest by common consultation, it would be much better.<sup>331</sup>

### 6.7 The Case of Bearer and Shah Hundis

Other differences in hundi usage had presented problems for several years.<sup>332</sup> Bearer hundis, for instance, were a case in point. These hundis were, as the description implies, ordered so that the carrier or bearer of the hundi in question, was to be paid on presentation, even if the bearer was unknown. Most often the hundi would not state the payee. Not all Shikarpur shroffs negotiated bearer hundis, although in Bombay they were more common. For many Shikarpur shroffs, payment was not possible unless the parties were known.<sup>333</sup>

On the other hand, it seems to have been in the interest of shroffs to maintain a distinction between a bearer and an order hundi. While a bearer hundi required no endorsements, an order hundi necessitated either a payee's name or subsequent endorsements. Shikarpur shroffs appear to have perceived endorsements as inconveniences. Negotiating a hundi which carried several endorsements, many of which would be in English, would not be intelligible to many within the community who could not speak English. A bearer hundi was practical in not presenting any obstacles to functional negotiability.

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<sup>331</sup> Ibid. vol. iv, p. 356.

<sup>332</sup> Legislative proceedings had debated the status of bearer hundis even as far back as 1882.

<sup>333</sup> "Report of the Bombay Provincial Banking Enquiry Committee, 1929-30." Ibid. vol. iv, p. 355.

About the question of bearer hundis, there is some conflict of opinion on one point. There was formerly the practice when people thought that once a bearer hundi should always remain a bearer hundi. Later on there was the decision of the High Court that a bearer hundi can be changed into an order hundi. The Government of India wanted to undertake legislation at the suggestion of bankers. I do not know whether you would like to express an opinion on this point?

– There is one thing, *viz.*, most of our people do not know English and there will be so many endorsements. Considering all these things, I say that if it is once a bearer, it should always remain a bearer hundi.<sup>334</sup>

## 6.8 On Shah hundis

Conversely, *shah* hundis presented other difficulties. A ‘shah’ denoted someone ‘respectable’ in the community. By respectable, it was generally understood that the person concerned was of good standing in the community, and therefore sufficiently credit-worthy. Usually this person had substantial wealth, and therefore could command sufficient credit flexibility in the marketplace. A shah hundi designated that type of instrument which was issued or drawn by one merchant on another with the instruments explicitly payable to or through a shah. It would pass from hand to hand as with an ordinary bearer instrument, until it had finally reached a shah’s hands. When the shah received the hundi, he would present the hundi, after making enquiries about the bearer, to the drawee for payment on behalf of the bearers. Unlike an order hundi, the acceptance of the hundi would not be written on the back of the hundi, but would instead be entered into the drawer’s book. Once a hundi had reached the hands of a shah, the negotiability of this hundi was thereby ended, and the instrument itself was regarded as properly discharged. In this way, the shah would ensure on his own honour and standing that the hundi’s payment had been made to the right person.

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<sup>334</sup> Ibid. vol. iv, p. 355.

Although a Shah hundi was not explicitly recognized as a bill of exchange within the NIA of 1881, it was accorded recognition as a customary practice pertaining to hundis. Hence, the British Indian courts did arbitrate and refer to the NIA when shah hundi disputes arose. With such a hundi, if a dispute arose, it was incumbent on the drawee to prove that payment was made to a shah; unless such proof was obtained, the drawee remained liable. For this reason, in a shah hundi transaction, it was particularly important to verify that a person who claimed to be a shah was authentic, and for the shah to ascertain that the payee was legitimately entitled to be paid the hundi. In theory, because of the stringency of its requirements, this hundi had the effect of a crossed cheque. However, fraud could nevertheless occur.

We can read from the following exchange between a member of the Bombay Banking Commission study group and the Shikarpuri Shroffs Association that shah hundis carried difficulties because a *shah* was no longer easily identified. Presumably, as business practices grew, they transcended traditional communal mercantile networks.

There is also another proposal by the Bombay Shroffs' Association. They say that in former times, a *shah* was a definite person; now-a-days anybody claims to be a *shah* and, therefore, there should be some association like theirs or like the Chamber of Commerce which should define who is a *shah* and a list should be kept. Is there any necessity for such a list?

– The opinion of my Association is, it is not practicable. The reasons are these. There are several associations. For instance, there is the Memon Association, there is the Borah Association and in Bombay there is the Marwari Shroffs' Association and there are several other associations. To make a list of all these and to go through the list every time referring to it from time to time is a very difficult task. Sometimes new firms are formed and certain firms are closed. Therefore it is a difficult thing to keep a list and to give intimation from time to time as to the changes that take place.

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<sup>335</sup> Ibid. vol. iv. p. 356.

Although the Shikarpuri Shorffs Association apparently thought that any lists would be onerous, the study group recognized the practical difficulties of maintaining the shah system without recourse to some authentication, particularly in a large area like Bombay. In the passage below, the representative for the study group describes a case in which fraud is easily perpetrated by gangs operating counterfeit shops. Even still the shroffs' association were unfavourably disposed to extra formalities governing shah hundi transactions.

Mr. V. L. Mehta: The difficulty arose in Bombay like this. After all, you can call anybody a shah. There is nothing in law to prevent anybody being called a shah. I shall give you an instance. Assume there is a firm in Shikarpur drawing a shahjog hundi on somebody in Bombay in favour of X, Y, or Z; instead of getting into the hands of X, Y, or X, it gets into the hands, through some wrong delivery by the post office, of somebody else who is not a shah, but who is a swindler. . What he does is, he gets hold of about half a dozen such hundis, collects Rs. 10,000 and decamps. And there is a gang of swindlers who have bogus shops. Such cases were brought to the notice of the Indian Merchants' Chamber and they introduced this new type of hundi. Under the shahjog system will not the drawee have to suffer under these circumstances?

---The cash will be taken by the drawee and he should not pay.

In Bombay the difficulty is this. In a small place like Broach or Ahmedabad, you can know who are the shahs, but in a big place like Bombay, it is very difficult to know who are the shahs?

– But the drawee should always take care to know whether he is a shah or not. He should have dealt with him before. It is for the drawee to take all precautions before making payment. If he were simply to believe that one is a shah, then he has to suffer.<sup>336</sup>

Unsurprisingly, given the shroff association's resistance to these particular administrative measures, the Banking Committees were unclear as to how hundi should become subject to specific standards. For instance, the Madras Banking Committee felt that the impetus and direction for this should come from the major mercantile communities: "The precise forms to be used for all

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<sup>336</sup> Ibid. vol. iv. p. 356.

hundis should be considered and fixed by a committee representing the principal banking communities including Multanis, Marwaris, Gujarathis and Nattukottai Chettiyars."<sup>337</sup> Nevertheless, this issue remained unresolved for many years to come. Customary practices effectively served to keep hundi out of the main banking sphere for several decades. Such was the complexity of the problem that the later Banking and Legal Study Commissions of the 1970s grappled with seeking to integrate customary hundi practices into the mainstream banking environment. As we shall see from the next chapter this task proved extremely arduous and ultimately unsettled.

## 6.9 Conclusion

Hundi was an important marker of indigenous banking activity for the PBECs of the 1930s. While the PBECRs grappled with understanding why hundi provided such negotiability in all the provinces under study, they simultaneously penetrate into the wider context within which hundi was functioning. From this analysis of hundi, we gain an understanding of the dynamics between indigenous bankers, the Imperial Bank, and the government. The financing of internal trade, we learn, was almost exclusively the remit of indigenous bankers, and crucially conducted through hundis. Nevertheless, its negotiability was affected through limitations imposed by both the Imperial Bank, and government with its creation of specific laws.

Since recognition was not always given to indigenous bankers by the Imperial Bank, hundi circulation suffered. The worsening status of

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<sup>337</sup> "Report on the Madras Provincial Banking Enquiry Committee." Vol. I, p. 142.

indigenous bankers in relation to the Imperial Bank, also had the effect of narrowing the remit of hundi acceptance. Discounting facilities, favourable lending periods for instance, were often not provided for. A tension also existed between recognition accorded to hundis within the bazaar versus those acknowledged within the Imperial Bank. At times prudence seems to have marked the banks attitude towards hundis it deemed as riskier. However, its assessment of risk was often clouded by its lack of comprehension for the bazaar.

How should we evaluate this lack of comprehension? From the evidence provided, at other times, the perception of risk was clouded by the bank's refusal to treat shroffs as bankers rather than merely as clients. This kind of tension also revealed itself in the disparity between the bazaar hundi rate and the Imperial Bank. Finally, shroffs felt that their position and, therefore, that of hundis had suffered because of the creation of 'discriminatory' laws, which more adversely impacted on indigenous bankers rather than the banking sphere as a whole.

Conversely, the PBEC did accord recognition to hundi as an important source of liquidity in the country. To this end, it attempted to garner information geared towards integrating the functions of hundi more fully with the Imperial Bank and the proposed setting up of the Reserve Bank of India. We learn from this process that standardization of hundi, particularly with reference to its numerous customary practices, was a target seen as desirable by several important shroff associations in the province. This was surprising to the PBEC, since the government had encountered resistance to hundi standardization in earlier years. However, this desire for standardization can importantly direct our sense of hundi spheres of business. With several customary hundi practices presented as obstacles to

indigenous banking, we can perceive that hundi business had surpassed communal boundaries alone. In the next chapter we shall see in detail how legislation around hundi was inherently problematic.



## Chapter 7 Hundi After Independence

This chapter touches on two large themes—continuity: making hundi mainstream, and discontinuity: making hundi illegal. An examination of the period 1969-1978, when the Indian government grappled with colonial legacies, draws out the first theme. This discussion focuses on the 1978 Banking Laws Committee's report on hundi codification.<sup>338</sup> Government reports and documents spanning 1958 to 1975 provide context for this report.<sup>339</sup> These documents also motivate a discussion around the culture of the law at the time. This is framed through an analysis of the problems of legal transplantation and the tussle between common-law and civil-law frameworks which was reflected in the status of hundi. The theme of discontinuity is shown through scrutiny of hundi's illegal status in the early 21<sup>st</sup> century, and resulting divergent approaches from the development and law enforcement sectors.

Twenty years after Indian independence was attained, and eighty seven years after the creation of the original Negotiable Instruments Act (NIA) of 1881, the status of indigenous negotiable instruments was freshly debated within government circles. Hundi once again became the subject of scrutiny for the Indian government, and symbolized both the status of indigenous

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<sup>338</sup> "Banking Laws Committee Report on Indigenous Negotiable Instruments (Hundis)," (Government of India 1978).

<sup>339</sup> "Banking Laws Committee Report on Negotiable Instruments Law," (Government of India 1975); *Technical Studies Prepared for the Banking Commission, Vol II*, (Reserve Bank of India, Bombay 1972); "Banking Commission Report of the Study Group on Indigenous Bankers," (1971); R Krishnan, "Agenda for the Meeting of the Study Group on Legislation Affecting Banking to be Held at Madras on 21st Oct," (1969); R Krishnan, "Banking Commission - Study Group to Review Legislation Affecting Banking - Minutes of the Inaugural Meeting of the Study Group held on the 21st October 1969 at the Reserve Bank Building," (Madras 1969, 21st October).

bankers and the legal culture surrounding the issue. Chapter six demonstrated that there was a growing disconnect between the Indian indigenous banking sector and modern banking even when the latter was still in its infancy in the 1930s. After the Banking Enquiry Committee Reports of the 1930s, other than the 1958 Law Commission report, no significant government initiative occurred until 1969. This 1958 report highlighted the lack of integration between the hundi and the modern banking sector. The 1960s saw the nationalization of banks and a revival of interest in hundi. However, by 1969, the rift between the two sectors had widened. Earlier legislation had the effect of marginalizing hundi, though it had not extinguished the system.

The survival of hundi drove the impetus for re-engagement with the instrument, resulting in the Banking Laws Committee drawing up a draft Hundi Code bill in 1978. Why did the Banking Laws Committee seek to draw up a new Hundi Act, rather than amend the existing legislative enactment—the Negotiable Instruments Act of 1881—to explicitly include hundi? What purpose did codification of hundi serve within the common law framework of India in 1978? Did it serve to consolidate hundi precedents in a single document? Or did it serve to give greater weight to traditional customary rules, rather than those established by statute and precedent?

According to the 1978 Banking Laws Committee's report, the codification of hundi rules and usages was successful. However, since hundi became illegal some time in the years following 1978, it seems likely that the bill was never passed. Why it did not do so must remain the scope of future enquiry beyond the remit of this thesis. However, the very attempt at codification, and the Banking Laws Committee's perception that it was

ultimately successful, yields critical information about the encounter between the indigenous and the legacy of the colonial legal architecture. This discussion focuses on the way in which the post-independence Indian government sought to reconcile the indigenous credit institution hundi with the legacy of colonial legislation. The manner in which the post-independence government attempted this reconciliation provides a framework and argument for perceiving an intimate relationship between law and culture. Certainly, colonial law left its imprint on the culture of Indian business practices, as seen through hundi. Conversely however, hundi also coloured Indian law, shaping its point and direction. This argument should not be construed as meaning that hundi was reflected in Indian law, but rather that its engagement with hundi illustrates a particular kind of significance and direction for Indian law in relation to the indigenous and its customs.

### **The Problems of Legal Transplantation**

As a general phenomenon, the history of Indian legislation during the colonial period, provides a classic example of the problems inherent in transplanting laws to fresh cultural contexts. It raises the question: how much of the larger cultural context should be moved into consideration? The attempt at codifying hundi provides a means for assessing legal reasoning at the time. Can we characterize law in the same way we might the behaviour of culture? Legal historians, for instance, seek to understand taxonomies of a given legal framework in order to better understand the behaviour of the law. Lawrence Rosen suggests that in characterizing legal processes we must look to their “spine” or “exoskeleton”. This, he argues, is perhaps better represented by understanding “the ways in which power is distributed

among various social institutions and the ways in which cultural conceptualizations are given authoritative recognition.”<sup>340</sup>

Rosen groups legal systems into three broad taxonomies: civil law, common law and traditional legal orders.<sup>341</sup> A civil law approach treats law as “an arm of central governance, and only recognizes socio-cultural practices as law when they have been incorporated within the centrally controlled system.” A common law approach tends to “distribute power widely among counterbalancing institutions and rely on low-level institutions to draw changing cultural practices within their purview.” Finally, traditional legal orders frameworks “seek to maintain the legitimacy of established practices as a vehicle for sustaining the traditional social structure itself”. This discussion identifies a contradiction in the aims of colonial law, for this vision was not simply transplanted into the Indian context, it carried principles which seemed at times to collide with each other.

Galanter’s discussion about panchayats illustrates this collision. In speaking of the movement to revive panchayats (village councils)<sup>342</sup> Galanter rationalizes that panchayats failed to assume their pre-British incarnation because of insufficient mobilization. Why was this so? His answer is: a lack of will. Panchayats in their old guise were not seen as a viable alternative to the official legal system. The old order of elites who might at one time have been proponents of pre-British panchayats, had long since given way to actors, such as an influential body of legal professionals, who had a heavy

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<sup>340</sup> Lawrence Rosen, *Law as culture : an invitation* (Princeton, N.J. ; Oxford: Princeton University Press, 2006). P. 40.

<sup>341</sup> Ibid. P.40. These are regarded as being useful for discerning types of relationships rather than being set in stone.

<sup>342</sup> See chapter one for more on this.

vested stake in continuing with the existing legal system. The legal system was seen to be an essential arm of post-Independence goals such as secularism, equality, freedom, national uniformity and modernity, though Galanter argues that this erosion of the traditional “resulted not from the normative superiority of British law, but from its technical, organizational and ideological characteristics.”<sup>343</sup> In this respect, Galanter has also argued that Indian law showed both an attachment to Anglo-Indian law as well as to an American-style constitutional overlay,<sup>344</sup> this in contrast to the perception in other quarters that British principles retained their primacy in the shaping of Indian law.<sup>345</sup>

### 7.1 Context of the report

The English legal system and that exported to its colonies, is founded on common law. Yet, in many ways, the Indian Stamp Act (ISA) of 1879 acted as a form of civil law, recognizing hundi and including it within its taxable remit as a ‘bill of exchange’. Similarly, the 1881 Negotiable Instruments Act (NIA), based in large part on the English Common Law of contracts, as modified by the English law merchant, also carried this purpose. It allowed the NIA to apply in all instances where hundis met with the English definitions of ‘cheque’, ‘bill of exchange’ or ‘promissory note’. And it excluded those hundis which did not fall within the definitional scope, except where customary Indian practices could not apply. In both cases the inclusion and exclusion suited the interests of central governance. As far as the ISA was concerned, the British Indian government did not wish to dilute

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<sup>343</sup> Galanter, "Aborted Restoration of Indigenous Law in India." P. 64.

<sup>344</sup> Marc Galanter and Rajeev Dhavan, *Law and society in modern India* (Delhi ; Oxford: Oxford University Press, 1989).

<sup>345</sup> See for instance: M. C. Setalvad, *The Common Law in India, etc* (pp. viii. 227. Stevens & Sons: London, 1960).

the power of its transplanted laws by giving regard to hundi's context and its aims. Thus, by describing hundi as a bill of exchange, the government grouped hundi within the same category of taxable English instruments. Likewise, the government did not wish to take the NIA away from its English roots by absorbing legal practices. As we saw in chapter five, legislators hoped that Indians would gradually discard indigenous customs in favour of English practices.

Of course, in both instances, there were practical problems in rigidly adhering to the civil law approach. For one thing, including hundi within the remit of the ISA practically guaranteed the regular occurrence of hundi stamp act disputes within the courts of law. Adjudicators were forced to focus on properties of hundi which fitted its English definition of 'bill of exchange', as we saw in chapter four. Conversely, although the NIA of 1881 and subsequent amendments chose not to include hundi within its remit unless customary practice did not apply, here too hundi cases found their way into the courts. As a result, the NIA was often referred to, or applied as a means of arbitrating on such disputes. In the process, a body of precedent constituent to hundi evolved in the British Indian, and later post-independence Indian courts.

In order for such precedent to evolve, the hundi disputes which reached the courts staged a common law versus civil law scenario. On the one hand, a borrowed legal system came into effect which sought to apply its rules with central governance at the forefront of its trajectory. On the other hand, since there was no precedent for hundi cases in English law, approximations from English precedent on negotiable instruments were applied.

As we saw in chapters four and five, this created challenges, for English law by itself could not apply. Legislators were faced with the recurring question of how much to borrow from English cultural contexts as against those from Indian indigenous customs. Over time, legislators did see some indigenous banking practices discarded in favour of corresponding English practices, but the evidence does not suggest that Indian customary hundi practices became obsolete.

Several customary practices were institutionalized through the various shroff associations. Recourse to the Indian courts appears to have been either a last resort, or a means of resolving disputes in which conflicting customs, from competing shroff associations, made the courts an indispensable third party intermediary.

Much to the confusion of legislators, customary hundi practices continued to co-exist with English practices. These practices were mutable, some of them fused with English law, making their point of departure indistinguishable. Precisely because of a common law framework, the transplant of laws did involve some transformation through levels of accommodation. And even when specific transplanted rules or provisions were not altered, their impact in Indian society obtained a very different flavour.<sup>346</sup>

This latter trend confirms the thought that legal transplants are in no sense straightforward. At what point did transplanted law become custom? And to what extent was custom also influenced by an external legal system? It is

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<sup>346</sup> Watson writes about this phenomenon of legal transplants, legal change and customary borrowings in his work: Alan Watson, *Legal Transplants : an Approach to Comparative Law*, 2nd ed. ed. (Athens, Ga. ; London: University of Georgia Press, 1993). P. 116.

an error to conceive of hundi custom as having been set in stone. Certainly by the time of the planned codification bill in 1978, it was evident that some forms of customary law could not present equitable resolution, or were simply insufficiently provable. In such instances, customs were discarded in favour of borrowed legal principles. Gradually, as precedent evolved, such borrowed rules of law would become recognized as customary law, particularly when applied to multiple times.<sup>347</sup>

The resultant cocktail of hundi rules derived from English and Indian indigenous banking custom was not something that squared easily with legislators. A wider international legal context also stimulated the renewed interest in hundis. The Law Commission's 1958 report on Negotiable Instruments Law observed that English and Indian law exhibited a lack of uniformity in its principles relative to those followed in other countries. This was regarded as "regrettable, particularly in view of the fact that the negotiable instruments have become the usual medium of the ever expanding international trade and commerce."<sup>348</sup>

The original Banking Commission meeting in October 1969 provides further context for revisiting the issue of hundis. In his paper, R. Krishnan the convenor of the meeting directed the attention of the Study Group reviewing legislation affecting banking, towards questions which had arisen on the subject.<sup>349</sup> Since negotiable instruments were considered the main medium of

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<sup>347</sup> Watson also speaks of this phenomenon. Ibid. P. 114.

<sup>348</sup> Ministry of Law Government of India, "Law Commission of India Eleventh Report on the Negotiable Instruments Act, 1881" (September 26, 1958). P.

<sup>349</sup> R. Krishnan contributed a chapter to the published volume of technical studies from information prepared for the Banking Commission between 1969 and 1970, entitled 'The Law Relating to Negotiable Instruments and Negotiable Documents', 1970 IN *Technical Studies Prepared for the Banking Commission, Vol II*.



international trade and commerce, the paper highlighted the need to review the law concerning such instruments. The discussion surrounding hundi underscored both that hundi still had problematic status, but also that it was still important. Krishnan outlined a backdrop within which there had been international steps to standardize the laws for bills of exchange and promissory notes. Although the 1930-32 'Geneva Conventions' laid down a "uniform law for bills of exchange and promissory notes",<sup>350</sup> the UK was one of a few countries which did not adopt these conventions. Consequently, India followed suit and also abstained.

However, the 1960s had seen a move towards the adoption of standardized rules by all banking entities in India, otherwise known as the Uniform Rules. By 1969, the Banking Commission of India felt that "the adoption of these Uniform Rules was reportedly held up on account of differences between the law and practice in India and the Uniform Rules."<sup>351</sup> Given that bills of exchange, promissory notes, cheques, receipts or other similar documents, fell under the classification where the Uniform Rules applied, hundi proved a bone of contention. The Commission sought standardization because of the practical difficulties of applying rules. It brought "the question of bringing indigenous bankers within the purview of legislation regulating banking" to the table. The overarching aim was to iron out inconsistencies with mainstream banking rules. A review of hundi was essentially called upon at a time when the Banking Laws Committee sought to align its own framework of negotiable instruments law with its international context.

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<sup>350</sup> Ibid. P. 405.

<sup>351</sup> Krishnan, "Banking Commission - Study Group to Review Legislation Affecting Banking - Minutes of the Inaugural Meeting of the Study Group held on the 21st October 1969 at the Reserve Bank Building.." P. 3.

One model for reviewing the banking rules was USA's 1958 official text of the Uniform Commercial Code (UCC). A joint product of the American Law Institute and the National Conference of Commissioners on Uniform State Laws in the U.S.A., this code offered a completely revised and modernized version of Negotiable Instruments Law. Krishnan reported that the Banking Laws Committee perceived critical changes in commercial practices since the introduction of the NIA and the formation of the UCC, rendering the NIA out-of-date. The UCC's standardized rules on the rights and limitation of all parties, served to offer a wider scope in the provision of bank deposits and collections, particularly in view of the increasing volume of transactions which cut across international borders.<sup>352</sup>

The Banking Laws Committee sought to bring NIA rules in line with recognized rules of international law. Principle matters concerned:

"The capacity of parties, the formal and essential validity of the contract, the liability of the parties including the formalities regulating presentment for acceptance/payment, notice of dishonour for non-acceptance/non-payment and noting and protest."<sup>353</sup>

International dealings in negotiable instruments were found to be poorly guided by the NIA, and the English 'Bills of Exchange Act'(1882) was "not considered as any 'better guide', and has been criticised as 'ambiguous' and verging 'perilously on the unintelligible'".<sup>354</sup>

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<sup>352</sup> *Technical Studies Prepared for the Banking Commission, Vol II.* PP. 407-408.

<sup>353</sup> *Ibid.* P. 410.

<sup>354</sup> *Ibid.* Here Krishnan cites Cheshire's "Private International Law", 4<sup>th</sup> edition for his view on the English Act.

Issues of jurisdiction occupied a prominent point of contention. *Lex domicilii* (Law of domicile) and *lex loci contractus* (Law of the place where the contract took place) were given differential importance by institutions. On the one hand, the Madras High Court had upheld the pre-eminence of *lex loci contractus*, while the Geneva Convention of 1930<sup>355</sup> framed a general rule based on *lex domicilii*. Ultimately, the Law Commission favoured the *lex loci contractus*, believing this would facilitate the use of negotiable instruments in international contexts. As far as hundi was concerned, this kind of standardization presented even greater difficulty. Discerning the *lex loci contractus* of any given hundi transaction, let alone the particulars of that law in terms of presentation and so on, was a highly complex task.

How the government could resolve this matter was left initially for the determination of an Indian Banking Commission. Created in March 1969, this Banking Commission was tasked with enquiring into the Indian financial system. Structure and methods of operation formed central lines of enquiry. However, uncertainty about the structure and methods of operation pertaining to indigenous bankers prevailed. The overarching aim of bringing indigenous bankers into the mainstream realm of banking, was "to ensure improved and efficient functioning of banking and non-banking institutions." However, the 1969 Commission viewed the issue as a matter for consideration rather than a hard and fast design. To this end, the Chairman of the Study Group held with the Chairman of the Banking

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<sup>355</sup> Ibid. P. 410. See also "LexMercatoria.Org," <http://www.jus.uio.no/lm/bills.of.exchange.and.promissory.notes.convention.1930/doc.html>.

Commission's belief that "there should be scope for sufficient flexibility in such matters".<sup>356</sup>

Initially, the Banking Commission considered whether the English Cheques Act of 1957, should be copied and hundis brought within its scope.<sup>357</sup> This was more in line with a civil law culture, by seeking to make hundis fit into the central arm of governance. Afterwards, the Banking Commission espoused an approach culturally similar to that of a common law framework; it sought to engage with indigenous banking institutions in a bid to bringing hundi practices within its purview. A Study Group was set up to investigate and report on indigenous bankers in 1971, particularly as the Commission observed that there was very little legislation regarding them.<sup>358</sup>

The report provided the first update into indigenous banking operations since the large-scale systematic Provincial Banking Enquiry Committee Reports of the 1930s. This report demonstrated the continued importance of hundi amongst indigenous bankers, both for ease of negotiability and liquidity, as well as acting as "an indispensable link between the organised banking system and the class of small borrowers who may not be in a position to obtain funds at the right time and in the right quantum from the organised banking system." Despite the fact that the indigenous bankers and modern banking sector were separate, hundi discounting shroffs were able

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<sup>356</sup> — — —, "Banking Commission - Study Group to Review Legislation Affecting Banking - Minutes of the Inaugural Meeting of the Study Group held on the 21st October 1969 at the Reserve Bank Building.."

<sup>357</sup> Krishnan, "Agenda for the Meeting of the Study Group on Legislation Affecting Banking to be Held at Madras on 21st Oct." See annexure. These points were proposed for consideration by Shri R.K. Seshadri, Executive Director, Reserve Bank of India.

<sup>358</sup> Krishnan, "Banking Commission - Study Group to Review Legislation Affecting Banking - Minutes of the Inaugural Meeting of the Study Group held on the 21st October 1969 at the Reserve Bank Building.."

to act as “vital” intermediaries to the commercial banks who possessed limited knowledge about the creditworthiness of small borrowers.<sup>359</sup> Previously, this kind of role would have been undertaken by a *Khazanchee* (treasurer), as we saw in chapter 6, however, the Imperial Bank phased out this role.

Even in the 1930s, recognition of hundi’s importance was provided by the Central Banking Enquiry Committee with the recommendation that hundis be linked to the Reserve Bank of India. The 1969 Study Group viewed this as having been a potential route by which “a truly integrated bill market adapted to the needs of the local environment”, might have developed.<sup>360</sup> Failure to integrate accordingly appears to have been the result of conflicting attitudes, inability to meet middle ground, and mistrust towards hundis used for trade transactions versus those entailing advances of money in general.

“The hardening of attitudes on both sides, however, rendered any direct link or integration with the organised sector difficult. The indigenous bankers were reluctant to segregate their banking and non-banking activities. Another major difficulty was that the authorities were sceptical of regarding the hundi as emanating from a particular trade transaction and therefore as a genuine trade bill. In their opinion the advances were more often in the nature of accommodation paper and in the absence of documentary evidence to back the paper, it was difficult to say that the credit was in all cases used to support a genuine productive activity.”<sup>361</sup>

This “hardening” of attitudes may also help to explain why, despite several amendments, hundi’s position relative to the Negotiable Instruments Act

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<sup>359</sup> "Banking Commission Report of the Study Group on Indigenous Bankers." P. 98.

<sup>360</sup> Ibid.

<sup>361</sup> Ibid. PP. 98-99.

(NIA) of 1881 remained unresolved. An ever contentious issue, the Banking Commission of India posed serious enquiries about whether it was necessary to advance legislation to cover indigenous negotiable instruments like hundis.<sup>362</sup> In the recommendation of the 1971 Banking Commission report, the Group rejected the wish “expressed in some quarters” advocating the discontinuance of indigenous negotiable instruments falling outside the remit of the NIA. The technical studies papers, prepared by the Banking Commission in 1970<sup>363</sup> proposed the potential necessity of bringing hundis within the framework of codified law.<sup>364</sup> The Banking Commission’s 1971 report on indigenous bankers appears to go a step further, proposing to both codify “peculiar incidents and usages” and bring them within the NIA.<sup>365</sup>

Why codify? The act of codifying hundi was believed “nearly a century” overdue. Even in 1968, the Banking Laws Committee advised the Finance Minister that “the indigenous banking system was not given the attention it deserved” during the colonial period.<sup>366</sup> As mentioned previously, although a number of hundis were theoretically excluded from the NIA, such as those written in the vernacular, in practice the statute did not always function in this way. In the case of contrary usage, and even if written in the vernacular,

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<sup>362</sup> Banking Commission, “Minutes from the Banking Commission Meeting of the Study Group on Legislation Affecting Banking held at the Reserve Bank Building, Madras,” ed. Legal (Legal Records F41430, 21st October 1969).

<sup>363</sup> These papers were written in 1970, but only published as a volume by the RBI in 1972.

<sup>364</sup> *Technical Studies Prepared for the Banking Commission, Vol II*. P. 412.

<sup>365</sup> “Banking Commission Report of the Study Group on Indigenous Bankers.” P. 107.

<sup>366</sup> “Banking Laws Committee Report on Indigenous Negotiable Instruments (Hundis).” P.i. Letter from the Chairman of the Banking Laws Committee to the Finance Minister, 26<sup>th</sup> September 1968,

where proof of a hundi's customary usage could not be supplied, the hundi would be subject to the NIA.<sup>367</sup>

On the back of recommendations from the Banking Commission, and because the matter of hundi was so complex, the Government of India decided to entrust the issue of hundi codification to the Banking Laws Committee of 1978. This was not the first time codification was proposed and attempted. Several commissions had underscored the importance of hundi prior to the 1978 Banking Laws Committee. In the Law Commission's eleventh report (1958), it observed that the hundi system should be preserved because of its utility in rural areas, where modern banking was lacking. The Banking Commission of 1972 pointed out that even where modern banking had sufficiently spread, hundi and the indigenous banking system played a no less necessary 'complementary' role.<sup>368</sup>

However, two earlier attempts to codify hundi, in 1881 and 1958 respectively, had failed, illustrating the challenge involved in undertaking codification.

"The suggestion made by some of the Chambers, however, was that hundis should be allowed to retain their peculiar incidents according to usage and that those usages should be codified by us. It is, however, not easy to define a hundi or to discover its essential attributes. It would appear from text-books and judicial decisions that no less than a dozen varieties of hundis are in vogue in this country. The usages differ so widely as between these species and from place to place that we can discover only a few characteristics or incidents which may attributed to hundis in general".<sup>369</sup>

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<sup>367</sup> Government of India, "Law Commission of India Eleventh Report on the Negotiable Instruments Act, 1881 ". Paragraphs 8 & 9.

<sup>368</sup> "Banking Laws Committee Report on Indigenous Negotiable Instruments (Hundis)." P. 3

<sup>369</sup> — — —, "Law Commission of India Eleventh Report on the Negotiable Instruments Act, 1881 ". Paragraph 14.

The 1975 Banking Laws Committee seems to have triggered the desire for a separate hundi Act. At this juncture, the government concluded that hundis could not be subsumed within the NIA. Certain important varieties of hundis operated as conditional instruments, whereas the NIA treated bills of exchange as unconditional orders.<sup>370</sup>

The 1978 report examines the matter of codification and details the Banking Laws Committee's recommendations.<sup>371</sup> In common with previous reports, this Committee outlined several of the instrument's continued functions. Hundi was still core to Indian indigenous bankers, merchants and trading community.

"The hundi is a means for (1) providing business credit, (2) remittance of funds and (3) financing the storage and movement of goods. Indigenous bankers or shroffs have recourse to hundis for carrying on their payment and credit transactions. Traders and merchants avail themselves of credit facilities from shroffs or remit funds by means of hundis. Merchants and traders also have recourse to hundis without the intermediation of any shroff. In other words, the hundi system has been serving from time immemorial the commercial and business requirements of our country's indigenous banking, merchant and trading communities."<sup>372</sup>

Since modern banks neglected interior parts of the country, rural and semi-urban areas particularly benefited from the existence of hundi, largely owing to the fact that it was classed as 'inexpensive', 'expeditious', and 'safe' in these areas.<sup>373</sup>

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<sup>370</sup> "Banking Laws Committee Report on Negotiable Instruments Law." P.31.

<sup>371</sup> "Banking Laws Committee Report on Indigenous Negotiable Instruments (Hundis)."

<sup>372</sup> Ibid.

<sup>373</sup> Ibid. PP. 2-3.



At that time, hundi was too useful to indigenous bankers, and their customers, for abolition to be considered. In concluding that hundis could co-exist and even compliment existing banking services, the 1978 Banking Commission demonstrated an engagement with the indigenous and its customs, which apparently sought to redress a cultural balance of power issue.

In effect, hundi occupied an uneasy hybrid space. On the one hand, it was excluded from the law. On the other, where customary sanctions could not apply, or where parties to a hundi transaction sought dispute resolution from the courts, it came under the purview of the law. The disputes seen in chapters three and five, as well as legislative debates on the status of hundi in chapter four are all valuable markers of a particular process that was taking place. Hundi disputes in the courts not only express the colonial encounter with the indigenous, but also the formation of colonial law. Furthermore, colonial law constituted an ongoing process reflecting interests which were particular to the cultural and political contexts in which it was embedded. It was not merely a straightforward transplant of English law in the Indian context. That is not to say that the colonial law was congruent with its Indian cultural and political context, however, it was not impervious to it either.

Through codification, the Banking Laws Committee's primary goal was to standardize hundi. In so doing, it expressed the belief that this would strengthen indigenous business practices and banking systems, so that they could have recourse to the legal system in order to have commercial and trade claims settled. It was also believed that hundi codification would support the economic development of rural India by lending greater

“respectability and certainty”<sup>374</sup> to indigenous business practices of village entrepreneurs and small businessmen.

Codification provided a means for the government to better understand indigenous banking and business practices and also extract the most useful and complementary hundi usages within a fresh Act. Within the draft Act, the Banking Laws Committee proposed retaining the essential features and attributes of the hundi system. As with other codification attempts, the challenge for the Committee lay in properly identifying such characteristics. The Committee’s engagement with hundi to achieve this goal reveals much about the culture of the law at the time.

## **7.2 The Committee’s Engagement with Hundi and the Culture of the Law**

How willing was the Banking Laws Commission to embrace indigenous customary practices? According to the Banking Laws Commission, there had been key institutional developments surrounding hundi dispute settlement mechanisms. Merchant guilds of ancient times had ‘devolved’ into chambers of commerce and sharafi associations. The Commission evidently regarded these associations as possessing their own strength and reliability. For this reason, it expressed surprise that the hundi system had not gained greater currency and acceptance amongst the rest of the business sector, including corporate entities.

The chambers of commerce and sharafi associations appear to have brought greater clarity to the practices of the hundi system. They laid down

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<sup>374</sup> Ibid.

institutionalized rules that were recognized by the British Indian legal courts, and successive courts following the colonial period. Moreover, as we saw from chapter six, merchant chambers of commerce recognized the purview and practices of other associations in their dealings with each other. Thus codes of hundi practice were relatively similar, and potentially, seldom in conflict. The systematic nature of the bazaar rate, was probably the most visible expression of this.

Yet even still, the wider public remained ignorant of these rules. Colonial government attitudes towards hundi at the time of the creation of acts like the Indian Stamp Act (ISA: 1879), and the Negotiable Instruments Act (NIA: 1881), persisted in the post-independence period. Such prevailing attitudes created the growing perception that hundi usages were confusing and impenetrable as far as codification was concerned.

Cooperation from the various associations vastly helped the Commission's task on this occasion. One clear reason for indigenous bankers' cooperation is attributed to constrictive elements of certain provisions falling under the Income Tax Act. Merchant and trade bodies were unable to fully utilize the hundi system because of these provisions.<sup>375</sup> So, it was in the interest of these bodies to cooperate as far as possible in order to raise their profile in the government's eyes. Another favourable condition for the process of codification was the attitude of the Government of India itself, which was described as more responsive than either the governments operating at the time the NIA of 1881 was framed, or during the period of the Law Commission's 11<sup>th</sup> report in 1958.

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<sup>375</sup> "Banking Laws Committee Report on Indigenous Negotiable Instruments (Hundis)." P. 4

The codification project sought to provide an up-to-date glance at hundi as it operated in 1978, and not merely in the past. In order to achieve its aims, the commission needed to extensively rely on sources other than judicial decision or well-known age-old customs. A questionnaire—which is in itself revealing of the extent of hundi knowledge at the time—was sent to 31 various institutions and individuals. The most useful input for the draft hundi bill, seems to have been hundi committees consisting of experts, who were believed to have been highly knowledgeable with the rules and practices relating to hundi.

Hundi rules and practices had always been a source of contention dooming previous codification attempts to failure. Chapters four and five detail some of the problems faced by the government at the time of the NIA's creation in 1881. Difficulties of this kind, the 1978 commission claimed, were due to the 1958 commission having inadequate data. Insufficient analysis of the primary features of the instrument also led to undue weight being given to “marginal differences found in the usages relating to the different forms of hundis between the different parts of our country.”<sup>376</sup>

The 1978 commission believed that the lack of data on hundi was also a consequence of too great a reliance on the decisions of courts. As we saw in chapters four and five, these decisions were based on some careful scrutiny, but such scrutiny as did occur was need-based and insufficiently comprehensive. The 1978 commission also observed this ad-hoc approach to

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<sup>376</sup> Ibid. P. 12.

hundi and strongly advocated the need for field study – it's primary method for ascertaining facts for the report.

Nevertheless, the 1978 commission recognized that hundi instruments with 'inconsistent usages' caused the greatest problems for the framers of the 1881 NIA and the 1958 commission. More accurately, these inconsistent usages constituted those hundi practices which were at variance with English bills of exchange, cheques and promissory notes.<sup>377</sup> For the 1958 Commission it was easier to simply propose that the hundi system should operate utterly outside the framework of codified law.<sup>378</sup> Clearly the 1978 Commission also found such usages too great an obstacle and this is why they opted to construct a separate act for hundi, rather than pursue full integration of hundi within the NIA.

Coming back to our introductory question, did codification of hundi serve to give greater weight to traditional customary rules, rather than those established by statute and precedent? The question strikes at the heart of the evolution of modern Indian law. Since Indian law is primarily of English origin, the codification of hundi raises the theme of fidelity of Indian law to British models, and assessing the relative influence of the international context in the government's selectivity of hundi customs.

It was mentioned previously that as hundi disputes appeared in the British instituted courts, several hundi customs fused with British practices, making their point of departure indistinguishable. There was a very practical reason

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<sup>377</sup> Ibid.

<sup>378</sup> "Banking Laws Committee Report on Indigenous Negotiable Instruments (Hundis)." P. 13.

for this, for the courts largely accepted the authority of those customary practices which could be authenticated through common law methods of assessment. British procedure, methods and doctrine would have permeated the Indian merchant community, so that even if Indian customary practices were not wholly discarded in favour of English practices, the influence of the latter in matters of litigation was indisputable. One could therefore argue that over the years hundi customary variation might have diminished considerably from what it had been at the time of the creation of the NIA.

There were yet other reasons for hundi customary usages to have evolved, at least in part, into a vehicle by which British principles of justice were transmitted. Prior to the 1958 Law Commission, the decade had seen a nationalist movement towards reviving indigenous justice. However, this revival was not to be unequivocally cast in customs as they had existed prior to the advent of British legislation. It also helps to explain why the goal of creating a separate hundi Act was also but an extension of the modern legal system in the guise of tradition. Consistent with the behaviour of transplanted legal systems, a civil law culture prevailed which sought to absorb hundi practices into the centrally controlled system under the guise of reviving tradition.

There was no longer any doubt that hundis in their entirety could not be properly embodied within the NIA as other English bills of exchange had been; several hundi customary usages diverted from English bills of exchange practices, rendering the NIA irreconcilable with hundi. Indeed the 1978 Banking Laws Commission concluded that hundis were in “a class by themselves”:

The NIA has confined itself only to three classes of instruments, viz, bills of exchange, cheques and promissory notes. In view of this, the courts in India have

held that the indigenous negotiable instruments (especially shahjog hundis) are neither bills, nor cheques, nor promissory notes and as such they are wholly outside the purview of the NIA.<sup>379</sup>

This event raises an interesting question: when the government made the decision that hundi could not be reconciled with the NIA, did this not essentially further demarcate hundi as the indigenous? In some sense it did for the government recognized hundi as being the 'other' and wished to bring it properly within its control. It was too complex a phenomenon to bring within the remit of the NIA. In fact, application of the NIA to hundis was rather inconsistent, often subject to the jurisdiction rather than absolute compliance:

17. There has been a difference of opinion among the High Courts as to the basis for applying any provision of the NIA to hundis even when there are no specific usages or practices proved with reference to any particular aspect. In such circumstances, while the Allahabad High Court seems to apply the provisions of the NIA "on the ground of the reasonableness of the rules" in the NIA, the Bombay High Court seems to apply the NIA provision "as a matter of course." In *Central Bank of India v. Khubram Roop Chand*, the Punjab High Court has held that where there are no inconsistent usages or practices with reference to hundis, the provisions of the NIA must 'substantially' as contradistinct from 'technically' be complied with". Thus, when there is no practice or usage to decide the question, the provisions of the NIA are not proprio vigour applied to hundis and in such cases, a substantial compliance with the NIA provisions is required.

18. However, the concept of substantial compliance is always a difficult question to decide. This concept lacks commercial certainty and leaves parties with a sense of doubt on the question as to whether or not in a given circumstance there has been the required compliance with the provisions of the NIA.<sup>380</sup>

Codification within a separate Act would not however diminish the power of the NIA, but rather bring those hundi practices which the government regarded as useful and consistent with the official legal system's principles, into alignment with the wider arena for negotiable instruments. In other words, hundi would never revert back to pre-British practices.

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<sup>379</sup> Ibid. P.13.

<sup>380</sup> Ibid. PP.13- 14.

There is indeed no evidence to suggest that the Indian business community wished a full reversion back to pre-British hundi practices. The notion that the Indian business community might even have possessed such an indisputable sense of pre versus post-British hundi practices is highly questionable. Perhaps it comes as no surprise then, that several shroff associations sought provisions in the Hundi code bill which were similar to those applicable to bankers under the NIA.<sup>381</sup> These provisions<sup>382</sup> outlined rules governing the presentment of acceptance or payment, along with the liability of the banker receiving payment of a cheque or draft. By seeking the same provisions, shroffs wished to be viewed in the same light as 'bankers'.

The hundi codification process quite clearly draws attention to law as a social institution relative to the larger political and social situation in which it existed. The input of specialized institutions such as the Indian mercantile associations served to show how the Banking Commission selected or abrogated rules relating to hundi. Despite the fact that shroffs sought these provisions, the 1975 Law Commission and the 1978 Banking Commission felt that hundis were *sui generis*, that is, a class unto themselves. Hundi was distinct from NIA instruments largely on the basis of customary conditions governing the use of hundi, concluded the Commission. Therefore, it argued that it was not necessary to apply the provisions of the NIA to hundi.<sup>383</sup>

R. Krishnan, the Secretary of the Banking Laws Committee, credited the indigenous sharafi associations (mercantile associations) for maintaining the

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<sup>381</sup> Ibid. P.7.

<sup>382</sup> *Negotiable Instruments Act*, (1881). See sections 85, 85A, 131 and 131A.

<sup>383</sup> "Banking Laws Committee Report on Indigenous Negotiable Instruments (Hundis)." P.17.



“vitality” of the hundi system. Writing in 1976, he described these associations as the “sustaining organisational link that has helped the hundi system to survive the powerful onslaughts from western trade influences and to withstand so far the attempts made at different times for the abolition of the system.”<sup>384</sup> Krishnan goes on to note that the sharafi associations crucially served to inexpensively and expeditiously<sup>385</sup> resolve a large number of hundi disputes, by implication, avoiding the need for length and expensive litigation in the courts. For “small businessmen” and “retail traders”, this was a particularly important dispute resolution channel. Drawing from documentation on Calcutta, Krishnan argued that most hundi dispute resolution was carried out successfully through the sharafi associations:

I may refer to an association in Calcutta which, during the year 1973 alone, seems to have received as many as 6,868 cases for settlement and that out of them, most of the cases seem to have been amicably settled through the intervention of the Hundi Sub-Committee of the Chamber. The custom of the land has sanctified this practice and the courts of the country have generally respected the decisions of the chambers.<sup>386</sup>

As we saw in chapter five, the courts did respect recognized sharafi associations. When hundi disputes reached the courts, litigators and judges referred first to any given rule presided over by sharafi associations within the jurisdiction.

Conversely, while the Commission argued for hundi’s distinctiveness relative to NIA instruments, it also acknowledged that the NIA provisions

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<sup>384</sup> Ibid. See Annexure 6, ‘Sharafi Associations’ Role in the Codification of the Hundi Rules’.

<sup>385</sup> Ibid. See Annexure 6.

<sup>386</sup> Ibid. See Annexure 6, p.107.

took primacy in the courts where hundi customs and usages were not at variance.<sup>387</sup> As we saw in chapter five, in practice this meant that disputing parties could, and did, bring two competing hundi customs into the courts. For the courts, decisions on which hundi custom should take priority were often guided by their sense of which party's custom better fulfilled contractual obligations according to consideration<sup>388</sup> that could be 'objectively' determined. In practice, as mentioned previously,<sup>389</sup> objectivity was subject to the degree of legitimacy given to customary practices according to British procedure, methods and doctrine. Those litigating parties that were able to make recourse to English law, and in particular the NIA, to support custom bound hundi agreements were likely to be more effective at gaining favourable resolution.

In essence, as hundi judicial precedent evolved in the courts, it is also likely that several hundi rules became either obsolete, modified or distorted with rules consciously and unconsciously imported from English law. Drawing on the 1971 Banking Commission's report on indigenous bankers, the 1978 Banking Laws Committee observed that "the [hundi] usages as to the negotiable paper are gradually changing and the tendency is to bring them more and more in keeping with the modern style of banking."<sup>390</sup> It also noted that various types of hundis had "fallen into disuse".

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<sup>387</sup> Ibid. P.17.

<sup>388</sup> Consideration in this legal sense was something of value given by both parties to a contract that would induce them to enter into the agreement to exchange mutual performances.

<sup>389</sup> See the discussion on p.14.

<sup>390</sup> "Banking Laws Committee Report on Indigenous Negotiable Instruments (Hundis)." P.21.

The Commission could readily perceive the benefits of certain hundis by likening them to English banking instruments. The *Namjog* hundi, was a named hundi, which meant that it could not be negotiated, and was only payable to the person named on the instrument. It could also only be endorsed if it was expressly for realization or collection. For the Commission this seemed functionally similar to an “account payee cheque”.<sup>391</sup>

A *Shahjog* hundi was traditionally a hundi that was only payable to a ‘shah’, most usually defined as a respectable person of some means, and of known standing in the bazaar.<sup>392</sup> It was drawn by one merchant on another, with the condition that the drawee ultimately pay out the hundi only to a ‘shah’. In effect, this served to reinforce the security of the hundi. On receipt of the hundi, it would be the shah’s responsibility to make sufficient enquiries as to the authenticity of the hundi itself, and to pay out to the holder. Once satisfied, the shah would present the hundi to the drawee for acceptance of the payment. The benefit of this kind of hundi was that if the hundi was ultimately discerned as fraudulent, or stolen, liability would rest with the shah—who served as a banker—and the drawee could seek a full refund from the shah.

In the Western zones of India this hundi had retained its traditional functional meaning. However, the Commission noted that the interpretation of *shah* in the Eastern zones had changed to simply mean: ““To Shri” or “To Shriman”, i.e., an expression of honorific significance without anything

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<sup>391</sup> Ibid. P.61.

<sup>392</sup> This meaning of shahjog hundi appears to be the most traditional judging by older descriptions of the shahjog hundi, as well as the etymology of the word shah itself. See for instance, Jain, *Indigenous Banking in India*.

specially intended thereby.”<sup>393</sup> After some discussion on resolving this divergence in usage, the 1978 Commission sought to sharpen the functionality of the hundi which most closely conformed to the prevailing culture of negotiable instruments. By seeking the addition of “two transverse parallel lines across its face”,<sup>394</sup> the Commission hoped to bring shahjog hundi functionality in line with that of a crossed cheque, and reinforce its protective qualities. In this way, the Commission consciously filled perceived gaps in hundi usages with rules imported from a wider English and international banking context.

A telling indication of American influence in legal matters by the 1970s, is revealed by the fact that the Banking Law Commission perceived an insufficiency in the NIA, and an even greater insufficiency in the English Bills of Exchange Act as compared to laws which had evolved in the United States. Given the transplanted quality of Indian law, Indian “common law” differed from English law in being largely codified, rather than being the substantively gradual accumulation of judicial precedent. As a consequence of the relatively limited bank of judicial precedent to draw on, Indian law tended to operate more at the interstices of an enumerated legislative framework.<sup>395</sup> Unsurprisingly therefore, US law carried more weight than is commonly acknowledged. By implication, this cast Indian law into more of a civil rather than common law culture.

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<sup>393</sup> "Banking Laws Committee Report on Indigenous Negotiable Instruments (Hundis)." P. 60.

<sup>394</sup> Ibid. P.61.

<sup>395</sup> Galanter discusses this idea.

### 7.3 Contemporary Approaches to Hundi/Hawala

The 2005 third international hawala conference<sup>396</sup> underscored two core approaches to hundi/hawala: recognising the value of remittances, and controlling the system's vulnerability to crime. Development agencies are cognisant of the system's efficiency gains, specifically with reference to the many migrant workers who use the system to remit funds back to the Indian subcontinent (and other locations) speedily and cost-efficiently. Perceived as a corollary to the subcontinent's weak modern banking infrastructure, hundi/hawala is defined as an *alternative remittance system*. Such agencies widely acknowledge the positive correlation between remittances and poverty reduction, and stress the need to view migrant worker remittances as an important vehicle to develop financial services. They have concluded that payment certainty, reliability, cultural convenience, and lowest cost, are factors driving the use of this Indigenous Banking System (IBS). The UK's Department for International Development (DFID) also emphasises the gap in efficiency between UK banks and money transmission service providers.<sup>397</sup>

Shifting remittances from so-called "informal" to "formal" channels is seen as a desirable objective by development organisations such as the World Bank, Asian Development Bank (ADB), International Monetary Fund (IMF) and DFID. These bodies adopt the line that hundi/hawala is core to countries such as India and Pakistan because they are cash-based economies. The IMF emphasises that systems such as hundi/hawala, frequently fill a critical gap

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<sup>396</sup> , (paper presented at the The Third International Conference on Hawala, Abu Dhabi, 2-3 April 2005).

<sup>397</sup> Ibid; Hennie Bester, "AML/CFT in Developing Countries," (2005). .

in cash-based economies which are usually characterised by limited financial capacity. Premised on this understanding of hundi/hawala, most development agencies have concluded that a broader range of financial services would benefit migrant workers and their families; on a macroeconomic basis, improved savings and investment possibilities are regarded as providing migrant workers with better economic prospects and means for managing financial risk.

However, if, as World Bank studies reveal, hundi/hawala channels are more resilient to financial shocks, and function in the midst of crises when all else fails—as with Afghanistan and Somalia—these ideas are questionable. Moreover, part of the appeal of so-called informal systems is the fact that they have much greater access to poorer people than the formal sector has and is ever likely to have. For instance, an independent South African consulting firm<sup>398</sup> found that fifty per cent of twenty seven million South Africans do not have bank accounts, whilst thirty eight per cent of existing accounts fall in to the low income category. Meanwhile, a sizeable proportion of South African households—thirty percent—live in traditional dwellings or informal structures, whilst only forty four per cent of the population were found to have formal addresses including postcodes. What is more, since this IBS is cheaper for all point-to-point international payments, this is a market incentive that regulators and development agencies would be hard-pressed to outdo.

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<sup>398</sup> ———, "AML/CFT in Developing Countries," in *The Third International Hawala Conference* (Abu Dhabi 2005).

#### 7.4 The Evils of Hundi/Hawala

In contrast, since September 11<sup>th</sup> 2001, the ensuing “War against terror” waged by the Bush Administration has sharply focused attention on hawala as a possible funding channel for militant activities. Hundi/Hawala has for some years also been linked to a number of other criminal activities ranging from money laundering, political corruption and the illegal trade in body parts. However, a more positive note was struck in relation to the system at the 2005 conference. The Financial Crimes Enforcement Network (FinCEN) sounded a note of caution against “fixating” only on hawala and “missing other vulnerable avenues”.<sup>399</sup> British HM Customs & Excise said it did not oppose IBS but highlighted the experience of dealing with criminal money laundering using “hawala techniques”.<sup>400</sup>

HM Customs & Excise critiqued the Financial Action Task Force (FATF) – the supranational institution which is responsible for issuing the main legislative and regulatory guidelines on money laundering and terrorist financing: it pointed out that one of the FATF’s core problems lay in definition. What, it argued, were correct definitions for *underground*, *illegal*, *alternative*, and *formal*? Pakistan’s National Accountability Bureau highlighted the many challenges it faced in regulating hawala, but also emphasised that the system itself was not considered criminal but rather those misusing the system. The FATF too distanced itself from vilifying hawala, indicating instead that the system was *exploited* for criminal use.

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<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

### 7.5 Regulators and their Discontents

These approaches to hundi/hawala demonstrate a fundamental problem for regulators: *how does one identify systems such as hundi/hawala?* This is a critical question, and one that seriously impinges on the feasibility of applying the FATF's forty standard Recommendations, and nine Special Recommendations (SRs), irrespective of their interpretive notes. For instance, the Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures – MONEYVAL<sup>401</sup>, expressed a concern with the possible use of *hawala-type* systems for an increase in human smuggling and trafficking, and larger sales of counterfeited goods found in its member countries.

A fundamental problem for most regulators is the lack of familiarity with hawala. Financial Action Task Force (FATF)-Style Regional Bodies (FSRBs) such as MONEYVAL expressed limited experience with hawala, and the difficulty in applying FATF Special Recommendation six (SRVI). Hundi/hawala falls under the FATF category *alternative remittance system* (ARS) and is subject to SRVI. SRVI and its interpretive note emphasises registration or licensing of hawaladars in a bid to increase the transparency of payment flows through remittance channels such as hundi/hawala.

Crucially, MONEYVAL found that distinguishing between so-called formal and informal systems proved arduous. The US' Financial Crime Enforcement Network (FinCEN) highlighted the complexity involved in identifying which businesses are "Money Services Businesses" (MSBs), yet

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<sup>401</sup> MONEYVAL is a sub-committee of the European Committee on Crime Problems of the Council of Europe.



another acronym which clouds definition. FinCEN includes money transmitters, cheque cashers, currency dealers or exchangers, issuers, sellers or redeemers of: money orders, travellers' cheques, and stored value, under the MSB banner. The IMF, on the other hand, includes courier services, bus companies, traders, microfinance institutions, and money carried by hand through family and friends as instances of remittance providers.

There is also the difficulty in applying SRVI to different national and regional contexts. It could be said that hawala provides a classic chicken and egg scenario. Which should come first - regulation on the basis of national experiences, or national compliance with international standards?

At the conference, HM Customs & Excise advocated risk-based regulation; a form of regulation that lies in evaluating the inherent risks of the problem before taking action. However, the trials in evaluating risks lie at the heart of law enforcement and financial regulators' problems. Since hundi/hawala is badly defined, it still seems to mean different things to different people. Interpol, for instance, drew attention to the differences in hawala usage; it perceived the Indian subcontinent to have a particular problem with invoice manipulation and gold smuggling. Pakistan's NAB acknowledged hundi/hawala's vulnerability to the transit trade in narcotics from Afghanistan. Citing a United Nations (UN) report describing an increase in the cultivation of opium in Afghanistan, the NAB representative indicated that economic incentives for farm opium represented a greater share of the problem than IBS itself. The NAB also emphasised the need for global policing; much of Pakistani criminal money ended up in the UK, which is regarded as a key hub for money laundering. HM Customs & Excise too expressed a concern with the abuse of hawala by criminal cash controllers, whom they had reason to believe were often drug traffickers.

In contrast, at the conference, Nikos Passas, offered a trenchant critique of over-regulation. He asked: "Are we exaggerating the risks of mosquitoes whilst elephant-sized risks are neglected?"<sup>402</sup> Describing many financial controls as "growing regulatory tsunami", he stressed that whilst regulation of hawala was necessary, rash regulation would drive hawala networks and transactions underground, and alienate a number of ethnic groups. He warned that erroneous counter-terrorism regulations would increase economic and other asymmetries, create grounds for more grievances and possibly nurture militant sentiment.

Compellingly, Passas suggested that trade was more vulnerable to real abuse. For instance, closer scrutiny of diamond import/export invoices showed a massive 20 to 30 per cent extra profit. Similarly, the disparity between global cigarette imports and exports was shown to have averaged an astounding 30 per cent between 1995 and 2000 (according to US Duty rates). Passas invited regulators to concentrate the better part of their energies on increasing trade transparency.

This underscores the relevance of a strong irrefutable historical connection between hundi/hawala and trade. However, as development agencies and regulators focus on migrant remittances and money laundering, the trade function has been understated to the point of being forgotten. A proper historical understanding of the system raises the following questions, all of which are critical to questions of policy and regulation: *to what extent is*

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<sup>402</sup> Nikos Passas, "Fighting Terror with Error? Transcending Fact-Free Policy Making.," in *The Third International Hawala Conference* (Abu Dhabi 2005).

*hundi/hawala still critical to trade from, to, and within India? What is the relationship between trade using this system and crime?*

Not fully understanding hundi/hawala creates major difficulties for regulatory and law enforcement agencies. How do they accurately identify suspicious transactions, for instance? How do they understand hundi/hawala records and customer bases? How do they determine methods of operation? Law enforcement agencies such as FinCEN and HM Customs & Excise must frequently resort to a reliance on certain broad observed patterns of transaction. FinCEN, for example, recognises the existence and use of cash-intensive businesses within close-knit ethnic communities to transfer funds to and from different countries. The conversion of bulk cash to monetary instruments such as money orders, to transfer funds abroad, is also seen as indicative of MSBs, but not necessarily hundi/hawala.

In *Operation Sparkle*, HM Customs & Excise targeted an alleged criminal network<sup>403</sup>, believed to be laundering the proceeds of drug trafficking. The Crown attempted to prosecute three individuals for contravening the 2002 Proceeds of Crime Act<sup>404</sup>; two of the defendants also faced charges of conspiring to launder money of illicit origin.<sup>405</sup> These two defendants were involved in the rag trade, buying second-hand clothes from a number of suppliers in the UK; the clothes were then shipped abroad, usually to Pakistan. The defendants claimed that they were carrying out hawala in the course of their garment business, rather than laundering money. The Prosecution asserted that “money of criminal provenance was introduced

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<sup>403</sup> Funds were confiscated from the defendants on 11<sup>th</sup> November 2003.

<sup>404</sup> Section 328, Anthony Reid, "Asian Trade Networks," in *Commercial Networks in Modern Asia*, ed. S. Sugiyama and L. Grove (Richmond: Curzon Press, 2001).

<sup>405</sup> *Regina v. Shahid Siddiq, Abid Iqbal, Christopher Hall*, (2006).

into the scheme to fund the purchase of clothing and was later realised when the goods were sold in Pakistan."<sup>406</sup> The defence had claimed that hawala was carried out to cost-efficiently remit funds for settling invoices pertaining to the garment business. The expert witness for defence also maintained that relationships of trust inherent within hawala networks, would make it much more difficult for criminally acquired funds to enter the hawala system. Thus crucially, the prosecution's case depended on demonstrating that the defendants were not in fact using hawala services.

On February 1<sup>st</sup> 2006, the case was officially dismissed; core pieces of evidence threading the prosecution's case were inadmissible in court. Nevertheless, the particulars of the trial raise a salient question: why would a business opt to use hawala rather than the modern banking system to settle invoices? The expert witness for the defence, Roger Ballard, attempted to clarify the defendants' use of the system. He stated that "the central purpose of contemporary hawala systems is to facilitate the transfer of value between one currency and another on a global scale."<sup>407</sup>

Yet, no one has fully identified what the *central* purpose of hawala is today, and this remains a difficult assessment given that the system can operate anonymously and is so hard to identify. The problem in identifying hawala also has implications for development agencies wishing to calculate the size of remittance flows. The figures are large but hopelessly sketchy, and guesswork remains the order of the day. What is known is that inflows to developing countries such as India, must necessarily be balanced by flows

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<sup>406</sup> Prosecution Case Summary, 2004

<sup>407</sup> Roger Ballard, "Methods of Account Settlement Utilised by Transnationally Oriented Pakistani Businesses: An Expert Report," (2006).11.

from developing countries to developed countries. Given that trade for centuries formed the backbone of hundi/hawala, it seems logical that goods or services of value might yet make up the belly of hawala transactions. For instance, according to Passas, hawala transactions, might well entail: "payments for imports; investment funds (in case of restrictions as, for example, in India); services provided overseas but paid for locally; over-invoicing of exports and bogus exports; tax evasion money; proceeds of criminal enterprises, such as cigarette or human smuggling, drug trafficking or any kind of fraud; contributions to militant and terrorist groups."<sup>408</sup>

## 7.6 Conclusion

Even though the Indian Banking Laws Committee was not successful at achieving its goal of introducing a new hundi act, the attempt at creating one provides much information about the state of Indian legislation at the time. The draft hundi bill directs our attention to the position and direction of the law in relation to the indigenous in 1978. In previous chapters we saw that transplanting English laws into the Indian context was not without significant problems and limitations, but by the 1970s, the matter of hundi also became subject to a wider international context of legislative trends and reforms.

Codification of hundi was attempted within the context of drawing on existing common law precedent. The attempt sought conformity as far as possible with existing Indian statute, adherence with international standards, as well as the extraction of the practical and cultural value of

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<sup>408</sup> Nikos Passas, "Hawala and Other Informal Value Transfer Systems: How to Regulate Them?," US Department of State International Information Programs. See also: ———, *Informal Value Transfer Systems and Criminal Organisations: A Study into So-Called Underground Banking Networks*.

hundi within its Indian context. Thus the model for reviewing hundi was greatly influenced by a wider national and international historical context. Accordingly, perceptions of hundi's functionality and negotiability were also subject to prevailing notions of negotiable instruments. In other words, the process of codifying hundi reveals how Indian law was primarily directed by a larger context.

In specific ways, the development of law around hundi in the courts, followed the Roman maxim *judicandum est legibus non exemplis* (adjudication is to be according to declared law, not precedent). As the NIA itself became more closely influenced by wider international trends in the negotiable instruments domain, so too did this filter through into the courts. Similarly, hundi precedent developed through the courts gave rise to an ever greater accretion of NIA influenced hundi practices.

While hundi's place and function in Indian society was coloured by the law, the attempt at codifying hundi reveals a process of greater estrangement, in formal terms between the NIA and hundi. Stronger lines of separation were drawn around the NIA in relation to hundi, coloured by an even greater sense of irreconcilable difference.

Judging by hundi's status in the 21<sup>st</sup> century, this kind of irreconcilable difference is perhaps the most significant legacy of the colonial period. It is clear too that the contemporary status of hundi has become even more problematic. The many problems that the colonial and post-independence Indian government grappled with have been unresolved. There is an odd contradiction in the evolution of hundi, for it developed a large body of precedent in the courts which was indicative of formalization. Conversely,

its tension with the NIA increasingly pushed it to the fringes of mainstream banking, where the decay of its status is evident in the 21<sup>st</sup> century.

## Chapter 8 Conclusions

In this study hundi provides a lens for the discussion of three key themes: *definition*, *formalization*, and *persistence and change*. With definition the study provides much needed conceptual clarity about hundi itself and refashions our understanding of what hundi was during the period. The second theme of formalization documents the treatment of hundi as a legal instrument. Finally, the theme of persistence and change examines issues of continuity and discontinuity.

These three themes have served as mile posts in delineating two strands of South Asian economic history: first, hundi's relationship with Indian merchants, and second, its status as an indigenous institution within the colonial and post-colonial period. In effect, these themes supply insights into these two strands.

Conceptual definition of hundi matters for the first strand because In better understanding hundi, we are able to penetrate into the financial world of Indian merchants, and important patterns of business organization. Definitional problems are a means of understanding one aspect of the relationship between the colonial and the indigenous government. The fundamental question: '*what is hundi?*' is posed throughout the thesis, and each chapter threw up the complexities of this basic question. Asking the 'what is' question is particularly important given the approach of conceptualizing hundi as both an instrument and system of credit. As an instrument, it represented credit, but the kind of credit it provided was not well delineated. It could function as different forms of credit depending on the context. Together with the way in which merchant reputation and type



of trade were embedded in hundi transactions, this justifiably lent hundi its character as a system as well as an instrument. This study constitutes an examination of hundi's importance as a credit institution to Indian merchants. It demonstrates that hundi was integral to the architecture of individual Indian merchant networks

### **8.1 Formality and Informality**

The second strand of this thesis examines how the indigenous credit institution hundi responded to government intervention during the period 1858-1978. By choosing the colonial period—a period of profound change—there is a clear engagement with how state-making altered aspects of hundi behaviour. Ultimately, this study of hundi must influence the way in which we understand how indigenous institutions are affected by colonial rule. This economic and legal history contributes to an understanding of how laws stimulated institutional change, and left a legacy which extended well beyond colonial rule. Essentially then, the study of hundi provides an economic and legal window onto a period of history in which indigenous mercantile relations started to carry the hallmarks of colonial state-making processes.

Hundi's status is shown to embody a tension between inclusion and exclusion from formal law. During this time, hundi was part of a dynamic in which legislation had broader aims and ideals. Hundi's status as an indigenous entity was, on the one hand, sharpened by colonial government legislation, but on the other, to some extent, assimilated and brought into the formal sphere. In the short-term accommodation characterized legislation, but in the long-term legislation was driven by the colonial impulse to assimilate. As hundi underwent its own process of change and resistance, the British Indian government was seen to variously marginalize,

accommodate and standardize hundi. This simultaneous sharpening and blurring of lines between hundi as the indigenous, and hundi as a recognized instrument of credit, was directly proportionate to the exclusion and inclusion of hundi within government legislation.

On the other hand, it simultaneously struggled to understand hundi. Legislative documents highlight hundi's significance as source of revenue for the colonial government, the government's inability to fully understand hundi, and the way in which hundi was changing in response to government formalization. Hundi's status has been strangely contradictory: on the one hand it was marginalized because it was little comprehended, on the other, it was governed and used as a source of revenue.

It is clear that the colonial government had a very functional approach to hundi. The pragmatism of their approach stemmed from a desire to maintain Indian merchant trade and also to marshal revenue streams. Assimilation was not required overnight, and in the meantime hundi was lucrative, much like a prize ship: captured but not dismantled.

While the hundi system was not properly understood by the British Indian government, it was nevertheless, in some measure, a product of the colonial period. Legal documents and cases illuminate the way in which the British Indian courts left their imprint on hundi via mercantile disputes. The judgements of the courts on legal cases simultaneously reveal the imperial government's ideology and long-term strategy of assimilating hundi to conform to English practices, but also its short-term pragmatic approach of accommodation. The Acts, in turn, are not only indicative of the colonial government's relationship with the indigenous institution hundi, but also of the way in which this indigenous institution was shaped, and was

conversely, at times impervious to colonial interaction. With each Act, hundi provides the means of scrutinizing the ways in which colonial laws could define how indigenous institutions continued to exist and behave.

In essence, this study draws out the way in which government action shaped hundi's formal and informal character. The ISA impressed upon hundi a character of authenticity and validity which cut across mercantile communities, despite the problems of hundi definition faced by the government. While the ISA ruled on authenticity and revenue issues, the NIA determined the particular elements which lent negotiability to a credit instrument. The NIA uncovered a dynamic of accommodation rather than mere exclusion in the government's approach to indigenous practices such as hundi.

This process of accommodation encapsulated a strategy to eventually assimilate Indian customary practices into European rules and conventions. Given that the courts often interpreted hundi custom according to their own English principles of equity and justice, the NIA, in common with the ISA, also paved the way towards a kind of formalization of hundi, albeit according to British benchmarks. Ultimately, court precedent and such Acts left a formal imprint on hundi affecting its negotiability and contractual integrity. The accretion of such litigiousness also signalled a change in the way merchants viewed the enforceability and logic of customary practice

Within this study, the systemic or institutional characteristic of hundi required particular emphasis. By drawing attention to the organic relationship between hundi as a form of credit and its contractual or institutional role, we can ask questions about hundi's agency as a means of enabling Indian merchants to expand their spheres of influence.

The legal cases provide insights into the contexts within which hundi was deployed between merchants, and the agreements which were struck in relation to hundi. These context-rich legal cases also usefully underscore instances when hundi transactions broke down. Such occasions in turn reveal examples of customary practice and enforcement mechanisms binding mercantile agreements. Importantly, by using a combination of legal explanatory theories as well as the empirical evidence of the court cases, this dissertation contributes to economic history debates on the institutional foundations of exchange. Were private order institutions sufficiently enforceable for long-distance trade? Evidence gained from hundi court cases would suggest that exogenously determined factors and incentives rendered merchant agreement rules inadequate, and encouraged the use of the 'background' rules or enforcement provided by the British Indian courts.

Did the government view hundi as 'informal' or 'formal'? Though a semantic quibble is not the objective here, this study does raise the question of whether the words 'formal' and 'informal' have much utility. Brought into the fold of government legislation on the one hand, and excluded from complete assimilation on the other, hundi absorbed both qualities.

Another significant aspect of this study is the depiction of instances in which the colonial government's legislation on hundi carried negative consequences for Indian merchant activity. Hundi's considerable position in the Indian economy during the 1930s is emphasized via the Provincial Banking Enquiry Committee (PBECRs) reports of that decade. Nevertheless, they also indicated that modern banking developments were overlapping with, and often threatening forms of Indian indigenous banking activity.

Was there one essential hundi which could be understood in all regions and contexts? Certainly, its core function as a measure of credit was understood in all contexts. However, since credit takes numerous guises, the PBECRs underscore the idea that hundi was conceptualized according to its various contexts.

As an integral instrument and system of Indian mercantile communities, one perspective that this research lacked was that of the merchant himself. Access to private merchant papers would have provided a unique insight into the functional psychology of hundi. They would have provided an insider's understanding of the relations of trust which bound hundi activity. Such papers essentially provide the voice and direct perspective of the merchant, presenting a merchant-centric approach to hundi. With the evidence utilized in this study, we can understand the rationale behind individual hundi transactions, and hundi as a system specific to particular merchant communities. Private merchant papers would have generated a perspective with which to understand how hundi was lived or experienced within merchant communities. How organic was hundi? And how integral was it to relations of trust? For instance, access to merchant account books or ledgers, would proffer a valuable means of assessing revenues generated by hundi for specific transactions, and between given individuals. We know that hundi transactions and their related interest rates were shaped by the credibility of the individuals who were conducting business, but did the ledger books reflect these reputation mechanisms. And how did hundi transactions also reflect the riskiness of given trade?

## 8.2 Legacy Years

In unveiling the dynamics of the legacy years, the Indian government adopted a pragmatic approach that was similar to the colonial government,

albeit for different reasons. Rather than marginalize hundi, the Indian government vested greater interest in the value of indigenous banking, and in particular hundi. However, there was an undercurrent of conflict. In the years following India's independence, the legal system continued to leave its imprint on hundi, and this epitomized a further gradual assimilation of the system. Nevertheless, the customary usage of hundi was troublesome to the legal architecture laid down by the British; this formed the impetus for the attempt to codify hundi and revise the law which had both shaped and marginalized hundi: the Negotiable Instruments Act. During these years, Hundi reflected the way in which the British Indian legal system was entrenched in the post-independence government architecture, and was also at odds with customary practices.

The process of codifying hundi reveals how Indian law was primarily directed by a larger context. Hundi's place and function in society were coloured by the law. And the failed attempt at codification reveals a process of greater alienation between the NIA and hundi. Stronger lines of separation, hinting at a permanent divorce, were drawn around the NIA in relation to hundi, coloured by an ever greater sense of irreconcilable difference.

### **8.3 Looking to the future**

Why the draft codification bill failed, when the Banking Laws Committee considered its exercise in codifying hundi a success, is not a subject that can be treated in this study. It is certainly worthy of exploration in future work. However, the retrospective knowledge that it did fail does inform our reading of the 1978 Banking Laws Committee report. We can read this report with the understanding that the Committee was still grappling with a complex and often vexing subject.

Even in the 21<sup>st</sup> century, as a living institution, hundi remains in the spotlight, and integration issues continue to appear impregnable. That is not to suggest that hundi within the period in focus was the same as it is in this century. However, the definitional problems which continue to plague modern policy makers provides significant rationale for understanding hundi's past. This examination of the institution's past establishes a number of important dimensions of the system.

Here in this study we can comprehend hundi as an Indian mercantile credit system which was enforced initially through multifarious mercantile customs. This narrative charts a process by which colonial legislation created a formal character to hundi that could not only be recognized outside mercantile communities, but also enforced in the British Indian courts. Juxtaposed against hundi's contemporary position as an 'informal' system, and marker of the black market economy in India, this neglected economic history of hundi has even greater relevance.

Hundi's illegality post-1978 is thrown into sharper relief by this study's focus on the institution's past 'formality' and 'legality'. While an examination of post-1978 regulation will prove important, this thesis provides an important foundation for such work. Why did the draft of the 1978 hundi code bill never come into being? When and why did hundi became illegal? Did future legislation affect the status of hundi? What considerations were made with respect to hundi at the time? How have Indian courts subsequently treated hundi cases? How has the status of hundi differed across South Asia?

#### 8.4 Precedent setting

Another important dimension of hundi that requires closer scrutiny, is the role of legal precedent in connecting and directing hundi's past and future. How far did legal precedent influence the evolution of hundi? What weight did existing legal precedents in English law (on bills of exchange or negotiable instruments) carry, as against custom? In other words, did legal transplants imprint themselves more strongly than custom. This thesis takes a first step at indicating the centrality of legal transplants to hundi, however it goes beyond the scope of this thesis to assess and articulate the strength of such an imprint.

A thorough, and systematic examination of cases on one aspect of hundi negotiability or contract, over a defined period, might well yield greater clarity. It would be valuable to investigate whether the courts arbitrated around specific kinds of hundi disputes more than others. This would tell us whether merchants had particular recourse to the courts when hundi failed in specific instances, and might also assist with the excavation of hundi custom. Whenever the courts chose existing English precedent over Indian customary practice, they were essentially placing greater authority on prior decisions made in an English setting, as against Indian customary practices. Precedents supported particular lines of reasoning, and by tracking these cases, it would be possible to establish the direction of such reasoning. We can speculate that it is perhaps for this reason that hundi codification did not come to pass. Perhaps hundi codification did not support particular lines of government reasoning?

Another point deserving greater scrutiny is the extent to which precedents were binding rather than persuasive of hundi resolution in the courts. The logic of the doctrine *stare decisis* is that courts were bound to follow



precedent. We might ask whether legal transplantation and application of the Negotiable Instruments Act and the Indian Stamp Act, for example, made *stare decisis* a more literal force in some respects? On the other hand, the fact that the courts did make reference to the rules articulated by Indian indigenous mercantile bodies in specific cases, as we saw in chapter 5, suggests a compromise in their approach at times. What indeterminacies of hundi prevailed in the law, against the backdrop of which competing interests?

At this juncture, the reasons for deciding – *the ratio decidendi* – become all the more important. The judicial reasoning employed in achieving resolution in these hundi cases, when studied together could constitute an important marker for lines of reasoning.

### **8.5 Legal Enforcement as a Necessity?**

Finally, there is the question of legal enforcement. The mere presence of these hundi cases in the British Indian courts suggests that there was a requirement for legal enforcement over and above the sanctions exerted through custom. It is not clear how many merchants sought resolution to hundi disputes via the courts rather than through customary sanction. The cases in chapter three demonstrate the fragility of agreement rules when background or default rules were weak. Court resolution had the effect of strengthening background rules particularly when borrowing from English precedent.

We saw in chapter five that judicial reasoning filtered English legal conceptions of contract and fairness, and applied these to hundi disputes. This must have been apparent to litigious hundi merchants seeking recourse of the courts. Did this ignite resistance in some Indian mercantile quarters,

or were the needs of merchants evolving in such a way as to make customary hundi sanctions insufficient? By the 1970s, the receptiveness of the Indian mercantile community to the draft codification bill, as seen in chapter seven, suggests the insufficiency of hundi sanctions without government recognition. We can conclude that Indian merchants embraced hundi codification as a means of rectifying hundi's increasingly marginalised status. However, this does not reveal whether legal enforcement, in and of itself, really did address intractable weaknesses in customary sanctions. Once again, future systematic work on hundi cases would help to unearth what was going on beneath the surface.

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